Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LYNN DOHERTY, Director of the Illinois Department of Employment Security, in her official capacity,

Petitioner,

v.

LUELLA PENNINGTON, individually and on behalf of other similarly situated persons,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In Illinois, a claimant for unemployment insurance benefits must have earned specified wages during his "base period," which is the first four of the last five completed calendar quarters that precede the filing of a valid claim. The majority of jurisdictions utilize a similar base period.

In order to receive federal certification and funding, a state unemployment insurance program must substantially comply with certain statutory standards of the Social Security Act, including the requirement to have "methods of administration . . . reasonably calculated to insure full payment of [benefits] when due." Federal law, however, does not interfere with a state's eligibility criteria for benefits.

The questions presented are:

1. Is the base period part of the state's monetary eligibility criteria, or is it a method of administration subject to the "when due" clause's requirements?
2. If the base period is a method of administration,
   (a) does the Illinois base period comply with the "when due" clause? and,
   (b) should the court of appeals have reviewed *de novo* this mixed question of law and fact?

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Lynn Q. Doherty, Director of the Illinois Department of Employment Security (successor in office to Loleta Didrickson and Sally Ward, former Directors of the Illinois Department of Employment Security), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The judgment arises from two successive opinions of the court of appeals, namely, *Pennington v. Didrickson* ("*Pennington I*") in 1994, and *Pennington v. Doherty* ("*Pennington II*") in 1997 after remand.

Pennington I

The order of the court of appeals denying rehearing is not officially reported but may be found at 1994 U.S. App. LEXIS 12754 (App. 40). The opinion of the court of appeals is reported at 22 F.3d 1376 (App. 16), *cert. denied*, 573 U.S. 1032 (1994). The final opinion of the district court is not officially reported (App. 69).

Pennington II

The opinion of the court of appeals in *Pennington II* is reported at 100 F.3d 502 (App. 1). The final opinion of the district court on remand is not officially reported (App. 43).

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its final judgment on April 4, 1997, in *Pennington II*. (App. 15). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 303(a)(1) of the Social Security Act 42 U.S.C. § 503(a)(1)

§ 503. State laws.

(a) Provisions required.

The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—

> (1) Such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; . . . .

Section 237 of the Illinois Unemployment Insurance Act 820 ILCS 405/237 (1996)

* * * *

For each benefit year beginning on or after November 1, 1981, "base period" means the first four of the last five completed calendar quarters immediately preceding the benefit year.

* * * *

Section 242 of the Illinois Unemployment Insurance Act 820 ILCS 405/242 (1996)

"Benefit year" with respect to any individual means the one-year period beginning with the first day of the week with respect to which the individual first files a valid claim for benefits. . . . Any claim for benefits . . . shall be deemed to be a "valid claim" for the purposes of this paragraph if the individual has met the requirements of Section 500E.

Section 500 of the
Illinois Unemployment Insurance Act
820 ILCS 405/500E (1996)

An unemployed individual shall be eligible to receive benefits with respect to any week only if the Director [of the Illinois Department of Employment Security] finds that:

* * * *

E. . . . . With respect to any benefit year beginning on or after January 3, 1982, he has been paid during his base period wages for insured work equal to not less than $1,600, provided that he has been paid wages for insured work equal to at least $440 during that part of his base period which does not include the calendar quarter in which the wages paid to him were highest.

STATEMENT OF THE CASE

Introduction

Under the Illinois Unemployment Insurance Act ("IUIA"), 820 ILCS 405/100 *et seq.* (1996), consideration for receipt of insurance benefits initially requires that an applicant file a "valid claim," meaning that the threshold monetary eligibility requirements of section 500E of the IUIA have been met. *See* 820 ILCS 405/500E (1996). This section provides that a claimant is only eligible if he was paid, during his "base period," $1,600 in wages for insured work, provided that at least $440 of that minimum amount was paid outside the calendar quarter in which the claimant's wages were highest. *Id.* Section 237 defines the "base period" as the first four of the last five completed calendar quarters preceding the benefit year. 820 ILCS 405/237 (1996). A claimant's benefit year begins to run with the filing of a valid claim. 820 ILCS 405/242 (1996).

Generally, benefits to claimants are funded by contributions or taxes imposed on Illinois employers, based on an employer's taxable wages and amount of benefits paid to former employees. *See generally* 820 ILCS 405/1400, 405/1500-405/1506.4 (1996).[1] A state's unemployment insurance ("UI") program is to receive federal funding for its administrative expenses (42 U.S.C. § 502), if the Secretary of the United States Department of Labor ("USDOL") certifies that the state's laws comply with certain administrative requirements, including 42 U.S.C. § 503.

This action was brought to question whether Illinois' base period requirement is an eligibility criterion left to the state's discretion and, if not, whether it is an administrative method that complies with the Social Security Act. As is shown in the first of Illinois' reasons for granting the writ, most jurisdictions that administer unemployment insurance programs have a similar base period requirement.

Nature of the Action

The jurisdiction of the district court was invoked under 42 U.S.C. § 1983, alleging a violation of federal law.

Plaintiff below, Luella Pennington, individually and on behalf of a certain class of applicants for unemployment insurance benefits, brought this civil rights action against the Director of the Illinois Department of Employment Security ("IDES") in 1985. Pennington was denied UI benefits upon filing her June 1984 claim because she had

[1] In addition to paying contributions, each Illinois employer is required to report the wages paid to employees in each calendar quarter; the wage report is to be filed within thirty days of the end of each quarter. 820 ILCS 405/1400 (1996).

earned no wages during her base period, the four calendar quarters of 1983. (R. Doc. 166 at 8). In October 1984, she was monetarily eligible for UI benefits based on her earnings in the first and second quarters (*id.* at 9), and she did receive benefits for the benefit year beginning October 1984 after filing a second, and this time valid, claim. (*Id.*).

In the district court, Pennington represented a class of claimants who are monetarily ineligible for benefits and who seek eligibility status by including their earnings that fall outside section 237's base period. (*Id.*). The plaintiff class challenged, as violative of the federal law, the Illinois statutory definition of "base period" (*id.* at 2), contending that it delays benefit payments to eligible claimants in violation of the Social Security Act's requirement that a state law include "methods of administration . . . reasonably calculated to insure full payment of unemployment compensation *when due*." 42 U.S.C. § 503(a)(1) (emphasis added).

The Director maintained that the defined base period is a component part of Illinois' eligibility requirements, which federal law fully entrusts to the states. Alternatively, the Director sought to demonstrate that the base period established by Illinois law does not violate the "when due" provision. (R. Doc. 166 at 3).

Proceedings in the Courts Below

Pennington I

During the district court proceedings, the Director of IDES moved to dismiss plaintiff's action and later sought summary judgment, relying in part on the ground that section 237 constitutes a state eligibility requirement. (R.

Doc. 14 & 97). The USDOL, as *amicus curiae*, joined in the Director's summary judgment motion. (R. Doc. 98). The district court denied both motions (and a request to reconsider), believing that the base period was a method of administration subject to the "when due" clause. (R. Doc. 21, 122 & 129).

Following denial of the Director's motions, the parties stipulated to many facts, procedures and issues (R. Doc. 166), and they then went to trial on disputed evidence regarding the feasibility of implementing and utilizing an alternative base period definition. Without resolving the disputed matters, however, the district court entered judgment for the Director, effectively overruling its prior determinations and deciding that the base period was an eligibility requirement. (App. 69-83).

The court of appeals reversed the district court's judgment and held that section 237 is not an eligibility criterion. Rejecting not only the position of the Director, but also the federal government's assertion of "its long-standing view" that issues of base periods are "matters of eligibility and therefore are not subject to the 'when due' clause and, indeed, are within the exclusive responsibility of the states," (App. 29), the Seventh Circuit ruled that section 237 is "an administrative method subject to the strictures of the 'when due' clause of the Social Security Act" (App. 39, 25-37). It remanded the case to the district court for factual findings and a determination whether section 237 complies with the "when due" clause and associated regulations. (App. 37-39).

Pennington II

On remand to the district court, the parties supplemented their evidence from the earlier proceedings with exhibits. For claimants that are monetarily ineligible under

section 237's base period, the plaintiff class proposed two alternatives for implementing a "moveable" or "alternative" base period ("ABP"), which would consider wages earned in the last four completed calendar quarters. (App. 51-54; Pl. Ex. 18). The district court made extensive findings of fact, resolving in IDES' favor the disputed question of the administrative cost to IDES to implement an ABP. (App. 44-60, 64-65).

The district court found that if an ABP were instituted in Illinois: (a) an additional 13,800 to 40,000 claimants (members of the plaintiff class) would be eligible for benefits in a given year; (b) approximately $30 million to $40 million per year in increased benefits would be paid out to claimants; (c) benefits to these claimants would be paid earlier than under the present base period; and (d) the cost to IDES to implement an ABP system would total $13.5 million in one-time conversion costs and $2.6 million in additional annual expenses. (App. 62-65).

Considering these four factors, the district court concluded that the benefits of an ABP to the plaintiff class outweighed the costs to IDES.[2] It therefore ruled that section 237's base period violates the "when due" clause and permanently enjoined its application to the plaintiff class. (App. 65-67).

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[2] At the same time that the district court deemed implementation of an ABP "administratively feasible" for IDES, it found that IDES would have to fund any ABP expense, was experiencing "severe budget constraints," and had decreased its staff from 3,000 to 2,100 between 1990 and 1994. (App. 57-58). Further, the court recognized that the federal government has failed to fully fund IDES' administrative expenses, despite the requirement to do so under 42 U.S.C. § 502, and that funding dropped 25% in "real" dollars between 1984 and 1990. (App. 57).

Applying a deferential standard of review to the mixed question of fact and law (App. 9 & 9 n.7), the court of appeals affirmed the district court's judgment. (App. 14). The court determined that the only inquiry was whether section 237 ensured payment of compensation with the "greatest promptness that is administratively feasible." (App. 10-11 (quoting 20 C.F.R. § 640.3(a)).

In so doing, the court refused to consider IDES' argument that more than one reasonable method of administration is compatible with the "when due" clause. (*Pennington II*, IDES Brief at 31-34, Reply Brief at 4-6). The court did not permit consideration of any other administrative concerns affecting IDES and employers or of the impact on employer contributions, which would justify Illinois' use of section 237's base period and render it reasonable. (*See* App. 13-14).[3]

REASONS FOR GRANTING THE WRIT

I.

THE DECISION IN *PENNINGTON I* JEOPARDIZES THE UNEMPLOYMENT INSURANCE PROGRAMS OF THE VAST MAJORITY OF STATES.

In a case of nationwide first impression, the decision in *Pennington I* addressed a question of exceptional importance and—beyond precedent and contrary to the fed-

[3] Contrary to the court of appeals' implication, IDES did not oppose a "comparative analysis" with an ABP (App. 13); its quarrel was with the narrowness of that comparison. *Pennington I* had also stated that to determine whether section 237 violated the "when due" clause, a court must "weigh the burdens and benefits of section 237 against the burdens and benefits of the plaintiff class's proposed moveable base period." (App. 25). IDES accepted this standard of comparison, but believed it was not employed.

eral administrative interpretation—extended the scope of the federal "when due" clause to Illinois' base period requirement, which measures monetary eligibility for benefits. Now that all of the factual and legal issues have been decided upon the final opinion in *Pennington II*, the petitioner's only judicial recourse is with this Court.

At the present time, 43 other states and jurisdictions use a base period identical to or similar to Illinois' section 237 base period, while eight states have added an ABP.[4] Virtually all of these base periods, including some

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[4] Jurisdictions with Illinois-type base periods include: Ala. Code § 25-4-1 (1992); Alaska Stat. § 23.20.520(3) (1996); Ariz. Rev. Stat. Ann. § 23-605 (1995); Ark. Code Ann. § 11-10-201 (1996); Cal. Unemp. Ins. Code § 1275 (1996); Colo. Rev. Stat. § 8-70-103(2) (Supp. 1996); Del. Code Ann. tit. 19, § 3302(2) (1995); D.C. Code Ann. § 46-101(6) (1996); Fla. Stat. Ann. ch. 443.036(5) (1997); Ga. Code Ann. § 34-8-21 (1992); Haw. Rev. Stat. Ann. § 383-1 (1994); Idaho Code § 72-1306(a) (Supp. 1995); Ind. Stat. Ann. § 22-4-2-12 (1997); Iowa Code Ann. § 96.19(3) (1996); Kan. Stat. Ann. § 44-703(b) (1993); Ky. Rev. Stat. Ann. § 341.090(1) (1995); La. Rev. Stat. Ann. § 23:1472(4) (1985); Md. Code Ann. § 8-101(b) (1996); Minn. Stat. Ann. § 268.04, subd. 2 (Supp. 1997); Miss. Code Ann. § 71-5-11(A) (1995); Mo. Stat. Ann. § 288.030.1(2) (Supp. 1997); Mont. Code Ann. § 39-51-201(2) (1995); Neb. Rev. Stat. § 48-602(1) (1993) (1st 4 of the last 5 quarters permitted and adopted by rule); Nev. Rev. Stat. Ann. § 612.025.1 (1996); N.H. Rev. Stat. Ann. § 282-A2 (1995); N.M. Stat. Ann. § 51-1-42(A) (1996); N.C. Gen. Stat. § 96-8(18) (1996); N.D. Cent. Code § 52-01-01.3 (Supp. 1995); Okla. Stat. Ann. tit. 40, § 1-202 (1986); Or. Rev. Stat. Ann. § 657.010(1) (1989); 43 Pa. Cons. Stat. § 753(a) (1996); P.R. Laws Ann., tit. 29, § 702 (1995); S.C. Code Ann. § 41-27-150 (1986); S.D. Codified Laws Ann. § 61-1-1(2) (1993); Tenn. Code Ann. § 50-7-218 (1991); Tex. Stat. & Codes Ann. tit. 4, § 201.011(1) (1996); Utah Code Ann. § 35-4-201(1) (1994); Va. Code Ann. § 60.2-204 (1992); V.I. Code Ann. tit. 24, § 302(b) (1997); W. Va. Code § 21A-1A-5 (Supp. 1996); Wis. Stat. Ann. § 108.02(4) (1997); Wyo. Stat. Ann. § 27-3-102(a)(i) (1997).

States that have some form of an ABP are: Me. Rev. Stat. Ann. tit. 26, § 1043.3-A (1996); Mass. Ann. Laws ch. 151A, § 1(a) (Supp. 1997); Mich. Com. Laws Ann. § 421.45 (1995); N.J. Rev. Stat. Ann.

(Footnote continued on following page)

ABPs, are subject to judicial challenge as a result of the *Pennington I* decision, causing disruption in the various states' unemployment compensation programs.

Pennington I opens the door in Illinois and almost every other state to further "when due" challenges to state criteria for determining monetary eligibility. Its use as precedent will not be limited to efforts to adopt the alternative sought by the *Pennington* plaintiffs—an ABP of the last four completed calendar quarters for those ineligible under the first four of the last five completed calendar quarters. In California, for example, the plaintiffs in *AFL-CIO v. Bradshaw*, No. C-97-0166 CAL (N.D. Cal.), are relying on *Pennington I* but seek an ABP of the last 52 weeks. Therefore, even those states with an ABP of the last four quarters would be subject to litigation to alter their moveable base periods.

Further, *Pennington I* could be extended beyond the eligibility interests of the plaintiff class. Inasmuch as the base period wages are also used to determine weekly benefit amounts (*see, e.g.*, 820 ILCS 405/401 (1996)), some claimants already eligible under the standard base period would receive higher benefits if their last quarter wages were also considered. (*See* Pl. Ex. 21 at 32-36 (study revealed 40% of such claimants would get higher benefits)).

Rather than relegate state unemployment insurance administrators to future years of uncertainty and costly

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[4] *continued*

§ 43:21-19(c)(1) (1995); Ohio Rev. Code Ann. § 4141.01 (Q) (1996); R.I. Gen. Laws Ann. § 28-42-3(3) (1995); Vt. Stat. Ann. tit. 21, § 1301(17) (1987); Wash. Rev. Code Ann. § 50.04.020 (1990). New York uses a base period of the last 52 weeks. N.Y. Labor Law § 520 (McKinney 1988).

litigation, this Court is urged to grant a writ of certiorari and to review the propriety of a base period requirement as an eligibility standard for unemployment benefits.

II.

WHERE CONGRESS HAS ENTRUSTED UNEMPLOYMENT INSURANCE ELIGIBILITY STANDARDS TO THE INDIVIDUAL STATES, THE SOCIAL SECURITY ACT'S "WHEN DUE" CLAUSE PROVIDES NO BASIS FOR INVALIDATING ILLINOIS' BASE PERIOD.

The *Pennington I* court below concluded that, as matter of law, section 237's definition of Illinois' base period was not an eligibility criterion, but rather was an administrative method and, therefore, subject to the "when due" clause. However, neither the plaintiff class nor the Seventh Circuit disputed that Illinois' requirement of certain earnings during some stated time frame is a legitimate measure of eligibility for UI coverage.

If an earnings requirement is not objectionable as an eligibility criterion, the specific components of that criterion should be recognized as substantive eligibility requirements, rather than methods of administration. The Seventh Circuit's decision represents the first time that the "when due" clause has been extended to reach a component part of the eligibility test itself. This extension blurs the very real distinction between substantive eligibility criteria and administrative methodology, a distinction that is well grounded in law.

A. The Social Security Act's "When Due" Clause Does Not Define Eligibility Criteria.

Section 303(a) of the Social Security Act addresses standards for a state's certification for federal funds and pro-

vides, in relevant part, that a state's "methods of administration . . . [must be] found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1). The USDOL has interpreted the "when due" clause to require that the states' UI statutes contain "methods of administration of the law" that assure both the "prompt determination" of eligibility or ineligibility status and the "prompt payment" of benefits "when determined under the State law to be due to claimants." 20 C.F.R. § 640.1(a)(1) & (2) (1996). Generally, regulations require that the methods of administration be reasonably calculated to assure full payment to *"eligible* claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a) (1996) (emphasis added).

While section 303(a) addresses the states' methods of administering their UI laws, it does not reach the threshold eligibility criteria established by UI laws. The Act and the regulations do not govern base periods and other standards of eligibility,[5] since "applicable Federal laws provide no authority for the Secretary of Labor to determine the eligibility of individuals under a State law." 20 C.F.R. § 640.1(a)(2) (1996). The *Pennington I* court paradoxically dismissed USDOL's long-standing interpretation that base periods are not within its purview, due to the lack of formal regulations on the very subject it deems to be left to the states' discretion.[6] (App. 28-31).

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[5] The federal government has, in fact, expressly adopted state base periods in establishing eligibility requirements for unemployment compensation for federal civilian employees, 20 C.F.R. § 609.3(a) (1996), and for ex-service members, 20 C.F.R. § 614.3(a) (1996).

[6] USDOL apparently still considers base periods to be eligibility standards, rather than methods of administration. *See Unemployment Insurance Issues, Hearings Before the Subcomm. on Human*

(Footnote continued on following page)

None of the previous "when due" clause cases has disturbed the eligibility standards that establish which persons have earned initial coverage under the individual states' insurance programs.[7] In *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971), the claimants were found initially eligible for benefits; however, benefits were suspended when their employers took an appeal to raise the disqualification issue of "discharge for cause." 402 U.S. at 123. This Court ruled that the statute violated prompt payment requirements "after an initial determination of eligibility." *Id.* at 133. The *Java* Court deemed payments to be "due" for purposes of section 303(a) at the earliest time administratively feasible after the worker and employer have an opportunity to be heard. *Id.* This Court, in *Fusari v. Steinberg*, 419 U.S. 379 (1975), read *Java* to require the prompt disposition of valid claims submitted to the administrative process for determination. 419 U.S. at 387-88. *See also Wilkinson v. Abrams*, 627 F.2d 650, 661 n.14 (3rd Cir. 1980) (unsuccessful challenge to USDOL's regulation on the disposition of second level appeals to Board of Re-

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[6] *continued*

Resources, Comm. on Ways and Means, 104th Cong., 2nd Sess., July 11, 1996, pp. 6-11, 27-34 (testimony of Mr. Uhalde, Deputy Assistant Secy. for USDOL, stating that agency position is unchanged); *see also Pennington I*, App. 38 n.9 (despite court's invitation to the Secretary to promulgate regulations on base periods over three years ago, none adopted).

[7] The court below erroneously construed the Director's argument as one that distinguished prior case law on the basis of whether an initial determination of eligibility had been made by the state agency (App. 34). As will be shown in the following discussion, the distinction made by the Director has been, and continues to be, one between the *procedures* to determine eligibility under a state's criteria and the *provisions* of those eligibility criteria.

view from adverse determination of eligibility, discussing *Fusari*).

However, when the claimant in *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977), attempted to extend the "when due" clause and *Java* to attack Ohio's decision not to cover workers whose unemployment resulted from a labor dispute, this Court firmly rejected that attempt, stating that "[n]othing in *Java* purported to define the class of persons eligible for benefits." 431 U.S. at 486-87.

Neither the Act, federal regulations, nor case law provides authority to disturb monetary eligibility requirements by applying the "when due" clause to questions of eligibility, rather than to methods of administration. The distinction recognized by this Court in prior decisions was improperly rejected in the present case, injecting uncertainty into the UI programs of virtually all states.

B. A Base Period Is A Component Part Of A State's Monetary Eligibility Requirements, Rather Than A Method Of Administration Subject To "When Due" Requirements.

" 'General [eligibility] rules are essential' " to a state's UI program even though adverse consequences result in some cases. *Ertman v. Fusari*, 442 F. Supp. 1147, 1151 (D. Conn. 1977) (quoting *Califano v. Jobst*, 434 U.S. 47, 53 (1977)). Whenever a state legislature develops its minimal requirements for insurance coverage, some individuals will claim to be adversely affected by the requirements chosen. This inevitability does not, however, mean that a state's eligibility requirements may be discarded by the federal courts in order to award benefits to a claimant for whom benefits could only be "due" under different criteria.

The Social Security Act's legislative history indicates that unemployment insurance was intended for the "ordinarily steadily employed," (Report of the Comm. on Economic Security at 1321-22, quoted in *Java*, 402 U.S. at 130-31) and need not be extended to every unemployed person. *Hodory*, 431 U.S. at 483. The twin components of Illinois' monetary eligibility requirement—the one year base period and the earnings threshold of $1,600 with $440 outside of one quarter—reflect where Illinois has drawn the line to effectuate that intent. Generally, these criteria ensure that benefits are available to those with a genuine ongoing attachment to the labor force.

The fact that the monetary eligibility standards may not operate perfectly in excluding those with a marginal work force connection does not alter their character as eligibility criteria. Under certain circumstances, a person, such as a member of the *Pennington* class, may ultimately qualify for benefits when all of his or her earnings fall within the base period. Illinois could have chosen higher qualifying wages or a different base period, as some states have.[8] Moreover, Illinois could have mandated that wages be earned in three or even four of the quarters of the base period—a tougher requirement with which the plaintiffs apparently would have no legal quarrel.

However, Illinois was not required to adopt any of these alternatives, rather than the standards it selected. Con-

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[8] The existence of an ABP is not the litmus test of fairness to the unemployed. For example, while eight states currently employ a moveable base period at least as broad as that sought by the *Pennington* class, the qualifying wages in those states are effectively higher than that required in Illinois. *See, e.g.*, Mass. Ann. Laws ch. 151A, § 24(a) (Supp. 1997); Ohio Rev. Code Ann. § 4141.01(R) (1996); R.I. Gen. Laws Ann. § 28-44-11(b) (1995); Wash. Rev. Code Ann. § 50.04.030 (1990).

gress recognized the "importance" of the states' interest in establishing their own UI programs "and especially their own eligibility criteria." *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519, 539 (1979). As each state designs its own insurance program, it is entitled to define the parameters of that program.

Congress wisely left eligibility criteria to the individual states. Eligibility standards necessarily govern how much money in benefits will flow out of the state's Unemployment Trust Fund, which is funded by taxes from the state's employers. 820 ILCS 405/240 and 405/2100 (1994). The method of revising eligibility criteria therefore should be through the state legislative process where policy makers can consider what changes would be necessary on the revenue side to accommodate any proposed revision in eligibility. As demonstrated in *Pennington II* and discussed later, when extending the "when due" clause to base periods, the judiciary's narrow focus fails to account for the significant funding impact that results from altering the criterion to make more claimants eligible.

Congress declined to establish a federal definition of the scope of coverage for UI benefits in the Social Security Act, and that Act's "when due" clause should not be utilized by the courts to impose eligibility requirements on the states. As did all state legislatures, the Illinois General Assembly chose certain criteria to provide a "snapshot" of recent work history to define entitlement to coverage, including the designation of a base period. Because virtually all base period choices of states, including some ABPs, are now subject to legal challenge under the Seventh Circuit's reasoning, this Court should grant *certiorari* to provide state administrators with much needed guidance in ensuring the acceptability of their statutory schemes under federal law.

III.

IF SECTION 237'S BASE PERIOD IS A METHOD OF ADMINISTRATION, IT DOES NOT VIOLATE THE "WHEN DUE" CLAUSE.

When the judiciary assumes the role of judging a state's compliance with the Social Security Act, which Congress has entrusted to USDOL's Secretary, the standard for compliance found in the Act should be applied by courts. That standard permits some flexibility in the state laws that are subject to the "when due" clause. The narrow focus of the court of appeals in *Pennington II* both failed to consider Illinois' concerns and permitted an ABP methodology to simply displace section 237's base period, absent the flexibility that the Act allows.

A. The Illinois Base Period Substantially Complies With The "When Due" Clause.

Section 303(a)(1) of the Social Security Act calls for methods of administration that are "reasonably calculated" to insure full payment of benefits "when due." 42 U.S.C. § 503(a)(1). Congress granted the Secretary of Labor "a great deal of flexibility in determining whether a state's program satisfies the statutory prerequisites to funding," since the program need only "compl[y] substantially," with section 303(a) to be certified. *Wilkinson v. Abrams*, 627 F.2d 650, 660 (3rd Cir. 1980) (citing 42 U.S.C. § 503(b)(2)); *see also* 20 C.F.R. §§ 640.3(b) & 650.3(b) (1996) (interpreting section 303(b)(2) as requiring substantial compliance with section 303(a)).

The Seventh Circuit has agreed with Congress and the Third Circuit, at least in the abstract, in recognizing the "when due" clause's ability to accommodate reasonable methods of administration. *See Pennington I*, App. 31

(within the confines of the "when due" clause, states "have a great deal of latitude" on administrative matters); *Jenkins v. Bowling*, 691 F.2d 1225, 1229 (7th Cir. 1982) ("If Illinois had good reason" to postpone payment, "we would not regard section 303(a)(1) . . . as a bar to postponement" that is reasonable). Even the regulatory standard applied below, which calls for methods that reasonably insure benefit payment and determination with the greatest promptness that is administratively feasible (20 C.F.R. §§ 640.3(a) & 650.3(a) (1996)), accommodates a "variety of . . . procedures" and the "differences in administrative procedures among states." *Wilkinson*, 627 F.2d at 662, 663.

However, in *Pennington II*, the district court's and court of appeals' test of compliance became: if the benefits of an ABP outweigh the cost of its implementation and operation, then section 237 violates the "when due" clause. (App. 12-13; App. 65).[9] By deciding this way, the court suggested that only one system could comply with the Act. If the court had applied the standard entrusted to the Secretary, the Illinois base period, as well as ABPs, could be "compatible with the 'when due' clause" (*Pennington I*, App. 38). *See also Pennington I*, App. 38 n.9 (the court recognized that the Secretary could establish Illinois' base period as acceptable). In fact, the Secretary is still certifying Illinois as being in conformity with the "when due" clause.

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[9] While the court of appeals characterized the parties as "agree[ing]" to weighing an ABP's benefits and costs (App. 12), the district court actually framed this as positions taken by the parties "at least implicitly." (App. 61). IDES, however, had presented substantial evidence beyond these factors (*see* App. 44-60) and argued that additional implications should be considered. (*See* App. 13-14).

The narrow inquiry in *Pennington II* ignored significant considerations that would have demonstrated the base period's reasonableness under the "when due" clause. Primarily, neither court below reconciled its conclusion that the enormous financial expense of implementing and operating an ABP was "administratively feasible" for IDES, which was underfunded, short-staffed, and suffered from severe budget constraints. (App. 57-58). The analysis further failed to consider the administrative and financial impact on employers, even though the *Java* decision took the lack of burden on employers into account. *California Department of Human Resources v. Java*, 402 U.S. 121, 135 & 135 n.19 (in finding California's appeal procedure violative of the Act, this Court found "no hardship on either the State or employer"). An additional factor overlooked was that persons in the *Pennington* class could get *higher* weekly benefits than a claimant now eligible under the existing system, even though the latter earned more wages and worked more quarters. (*Pennington II*, IDES Brief at 41, Reply at 13-15).

Had these and other factors been considered, an assessment of Illinois' base period would not have led to the conclusion that it failed to comply with the "when due" clause. In this area of general importance to all states, but where this Court has seldom spoken, it is imperative that the standard applied by the court below be corrected and that proper guidance be given courts that assume the role of the Secretary of USDOL.

B. A *De Novo* Standard Of Review Applies To This Mixed Question Of Law And Fact.

Mixed questions of law and fact have been described as issues in which:

> the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.

Pullman-Standard v. Swint, 456 U.S. 273, 290 n.19 (1982). Where the issue falls "between a pristine legal standard and a simple historical fact," this Court has acknowledged that "the fact/law distinction at times has turned on a determination that, as a matter of sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

Thus, "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991) (citing *Miller*, 474 U.S. at 114). However, where "the relevant legal principle can be given meaning only through its application," there is a reluctance to give deference and thereby "strip a federal appellate court of its primary function as an expositor of law." *Miller*, 474 U.S. at 114 (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503 (1984)); *see also Ornelas v. United States*, ____ U.S. ____, 116 S. Ct. 1657, 1662 (1996) (holding that *de novo* review of a mixed question of law and fact was warranted so that appellate courts "maintain control of, and [ ] clarify the legal principles," "unify precedent" and prevent varied results).

In the present case, the facts were admitted or established at the district court level and were not challenged by

IDES on appeal. The sole issue was whether the statutory "when due" standard was violated based on the established facts. The court of appeals correctly determined that a mixed question of law and fact was thus presented, but improperly applied a deferential standard of review, rather than a *de novo* standard. (App. 9 & 9 n.7).

The court of appeals' reliance on this Court's decisions in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401-05 (1990), and *Pierce v. Underwood*, 487 U.S. 552, 559-61 (1988), for a deferential standard was misplaced. Unlike this case, an abuse of discretion standard was applied in *Cooter* and *Pierce* precisely because the district court was "better positioned" than the reviewing court to make necessary factual determinations. *See Cooter*, 496 U.S. at 401-02 (in review of Rule 11 sanctions, which was compared to a negligence finding, district court must assess credibility and is familiar with the issues and litigants); *Pierce*, 487 U.S. at 559-60, 562 (whether government's position is substantially justified for attorney's fees purposes "may be known only to the district court," which may have "insights not conveyed by the record").

In this case, this Court and the court of appeals, as expositors of the law, are better positioned than the district court to determine what the federal law requires and whether it has been violated. Therefore, this Court is further urged to grant *certiorari* to clarify its precedent on the standard of review for mixed questions of law and fact.

CONCLUSION

For these reasons, the Director of the Illinois Department of Employment Security respectfully asks this Court to issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-1499

LUELLA PENNINGTON, individually and on behalf of other similarly situated persons,

Plaintiff-Appellee,

v.

LYNN DOHERTY, Director of the Illinois Department of Employment Security, in her official capacity,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 6327—**Paul E. Plunkett**, *Judge*.

ARGUED OCTOBER 23, 1996*—DECIDED APRIL 4, 1997

Before ESCHBACH, RIPPLE and KANNE, *Circuit Judges*.

RIPPLE, *Circuit Judge*. This is a successive appeal. Luella Pennington, the class representative in this § 1983 case, seeks injunctive relief from the operation of one of the provisions of the Illinois Unemployment Insurance Act ("IUIA"), 820 ILCS 405/100 *et seq*. In

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* This successive appeal was heard by the original panel pursuant to Operating Procedure 6(b).

Pennington v. Didrickson,[1] 22 F.3d 1376 (7th Cir.) ("*Pennington I*"), *cert. denied*, 115 S. Ct. 613 (1994), we held that Illinois' method of determining a base period, on which entitlement to benefits was calculated, was not an eligibility requirement, but an administrative provision, of the program. Accordingly, we concluded that the provision was subject to the "when due" clause of section 303(a) of the Social Security Act ("SSA"), 42 U.S.C. § 503(a). We therefore remanded the case to the district court to determine whether section 237 of the IUIA, which sets forth the formula by which Illinois calculates the base period, complies with SSA § 303(a) by ensuring the greatest promptness in paying unemployment benefits. *See* 22 F.3d at 1387-88. The district court, after accepting further submissions from the parties, concluded that section 237 violates the "when due" clause of the SSA. For the reasons that follow, we affirm the judgment of the district court.

I
BACKGROUND

A. *Facts*

Because this case is a successive appeal, we shall assume a familiarity with the facts set forth in our previous opinion, *see Pennington I*, 22 F.3d at 1378-81, and limit our rendition here to a repetition of those matters most pertinent to the resolution of this appeal.

The plaintiffs are claimants for unemployment insurance benefits under the IUIA, Illinois' unemployment insurance program. Their claims have been either delayed or denied because of the manner in which the IUIA defines the term "base period." Section 237 of the IUIA

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[1] Lynn Doherty replaced Loleta Didrickson as the Director of the Illinois Department of Employment Security ("IDES").

defines "base period" as "the first four of the last five completed calender quarters immediately preceding the benefit year."[2] 820 ILCS 405/237. For example, for an individual who filed for benefits in June of 1993 (during the second quarter of 1993), the resulting base period under the IUIA would be the four calendar quarters of 1992. *Pennington I*, 22 F.3d at 1378. The first quarter of 1993 would be the lag quarter, and the second quarter of 1993 would be the filing quarter.

In *Pennington I*, we held that the base period was not an eligibility requirement, as the district court had held it to be and as IDES had maintained. Rather, it is an administrative provision subject to the "when due" clause of the SSA. Section 303(a)(1) of the SSA, the "when due" clause, provides that a state's unemployment insurance law must provide for "'such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due.'" *Pennington I*, 22 F.3d at 1378 (quoting 42 U.S.C. § 503(a)(1)). The Secretary's regulations amplify this statutory provision: The state must implement "such methods of administration as will reasonabl[y] insure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a). Had we accepted Illinois' contention in *Pennington I* that the definition of base period was an eligibility requirement rather than an administrative provision, section 237 would not have been subject to the "when due" clause. *See* 22 F.3d at 1381 & n.4.

Having determined that the designation of a base period was an administrative provision subject to the

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[2] A "benefit year" is the one-year period beginning on the first day of the week in which the individual first files a valid claim for benefits. 820 ILCS 405/242.

"when due" clause, we reversed and remanded the case to the district court to determine, based on the evidence it had and on any further submissions from the parties, "whether section 237 insures the greatest promptness in paying unemployment benefits that is administratively feasible, making all factual findings that it deems necessary to the resolution of that issue." *Id.* at 1388. To make this determination, we held that it was necessary for the district court "to decide whether section 237's base period strikes a reasonable balance between the plaintiff class's interest in prompt payment of unemployment insurance benefits and the state's interest in minimizing the costs of eliminating delay and in preventing fraudulent claims." *Id.* at 1387 (internal quotation and citation omitted).

B. *District Court Remand*

The district court, both in the original proceeding and on remand, had a voluminous record containing evidence and testimony about Illinois' current wage record system and about the plaintiff class' various alternative proposals. Under the current system, section 237 requires an examination of the first four of the five previously completed quarters to determine whether sufficient insured work has been done to award the benefits. These four quarters are the base period under the current system.

The alternatives incorporated other base periods which, in the view of the plaintiffs, fulfilled the statutory mandate. An alternative base period ("ABP") looks to a different set of four quarters to determine whether sufficient income was earned. In the ABPs proposed by Ms. Pennington, for example, the ABP for those who did not meet the income requirements of the section 237 base period would be the four completed quarters preceding a claimant's filing of a claim. Under both of the plaintiff class' alternatives, IDES, in determining the benefits for

a claimant who did not qualify for benefits under the section 237 base period, would look to the lag quarter and the three preceding quarters to determine the claimant's benefits. The primary difference between the two proposed alternatives is that the second alternative incorporates a wage request system for some of the lag-quarter eligible claimants. The parties' submissions on these alternatives included substantial evidence on their likely benefits as well as on the potential costs of implementing them.

The district court, in a thorough and well-reasoned opinion, weighed four factors to determine whether section 237 strikes a "reasonable balance."[3] R.220 at 21. In the court's view, three of these factors weighed in favor of a determination that the current system was not compatible with the "when due" clause of the federal statute. First, the court found that the number of additional claimants who would be eligible under an ABP system represented a significant increase. The evidence indicated that, in a given year, between 13,800 and 40,000 members of the plaintiff class would be eligible for benefits if lag quarter wages were considered. Second, the amount of additional benefits, $30 million to $40 million per year, that IDES would pay out under an ABP system would be a "*dramatic* increase in financial benefits to unemployed persons." *Id.* at 23. Finally, the parties stipu-

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[3] The district court also examined another factor that we had indicated ought to be considered in its determination: whether a change to a different system would increase the number of fraudulent claims. The court determined that this factor ought not play a significant role in its analysis. IDES did not argue on remand that adopting an ABP would necessarily lead to an increase in the number of fraudulent claims. Rather, it contended that certain methods of implementing an ABP carry with them risks of increased fraud. Therefore, the district court did not consider the threat of increased fraud within the system to be a prominent term within its equation.

lated that the adoption of an ABP in Illinois would speed the payment of benefits to those claimants whose benefits are delayed under the present system. The court found that an ABP system results in prompter payments to lag-quarter eligible claimants and to filing-quarter eligible claimants. On average, the ABP would result in a lag-quarter eligible claimant receiving his benefits 45 days earlier than under the current system. In the most extreme cases, a claimant would receive benefits 12 weeks earlier under an ABP than under section 237's base period.

The final factor, the costs to IDES to implement an ABP, favored, in the view of the district court, the position of Illinois that these alternatives were not feasible. In determining these costs, the court relied on IDES' cost estimates. It did so for two reasons. One, it found IDES' evidence on costs more credible. Two, it believed that accepting the highest cost estimates proffered demonstrated most clearly whether the additional benefits gained from moving to an ABP outweigh the costs of that move. IDES had estimated that it would incur a one-time cost of approximately $13.5 million for computer conversion and additional staff. It also estimated that the ABP would cost an additional $2.6 million annually. These expenses would come at a time, according to the district court, when IDES already would face budgetary constraints.

The court concluded that, although the additional costs to IDES would be great, the benefits to the plaintiffs "clearly outweigh the costs to IDES." R.220 at 25. Thus, the court reasoned, "section 237 violates the 'when due' clause because it does not insure the greatest promptness in paying unemployment insurance benefits that is administratively feasible." *Id.* The district court therefore enjoined IDES permanently from applying section 237 to the plaintiff class.

Finally, pursuant to our direction in *Pennington I*, the district court did not adopt as a remedy either of the alternatives suggested by the plaintiff class. The determination of what system ought to be implemented is the prerogative of the State of Illinois. *See* 22 F.3d at 1388.

II

DISCUSSION

A.

1.

Because this is an appeal in a case that we remanded in *Pennington I*, it is governed by the law of the case established in that first appeal. The law of the case doctrine "limits redetermination of rulings made earlier in the same lawsuit." *Rekhi v. Wildwood Indus.*, 61 F.3d 1313, 1317 (7th Cir. 1995) (emphasis omitted) (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988)). Therefore, the matters decided in *Pennington I* become the law of this case to be followed in this appeal "unless there is a plain error of law" in our earlier decision.[4] *Rothner v. City of Chicago*, 929 F.2d 297, 301 (7th Cir. 1991). Although not a straightjacket, *Avitia v. Metropolitan Club*, 49 F.3d 1219, 1227 (7th Cir. 1995),[5] the doctrine is not to be set aside or disregarded

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[4] A panel in a successive appeal may re-examine its previous decision if it has a "strong and reasonable" conviction that its earlier decision was wrong and if the change would not cause undue harm to the party who had previously benefitted from its ruling. *Avitia v. Metropolitan Club*, 49 F.3d 1219, 1227 (7th Cir. 1995) (citing *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)).

[5] Two further exceptions justify a court's divergence from the law of the case: if the evidence adduced in a second trial is

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lightly. It is "'based on the salutary and sound public policy that litigation should come to an end.'" *Rothner*, 929 F.2d at 301 (quoting *Shakman v. Dunne*, 829 F.2d 1387, 1393 (7th Cir. 1987) (internal quotation and citation omitted), *cert. denied*, 484 U.S. 1065 (1988)). There is no justification to deviate from the law of the case doctrine here.

2.

We turn to the applicable standards of review. We review findings of historical fact by the district court under the clearly erroneous standard. However, there is no real dispute between the parties as to the historical facts of the case. As IDES notes in its brief, the majority of the evidence presented to the district court was undisputed by the parties or was the subject of stipulation. The principal area of factual disagreement, the comparative costs of alternates to the current program, was determined in favor of IDES by the district court. To the extent that the submissions of the parties require us to determine whether the district court, in formulating a methodology for its inquiry, correctly interpreted the mandate of *Pennington I*, the question is one of law, and our review is de novo.[6] Finally, we must evaluate the

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[5] (...continued)
substantially different from that of the first trial and if controlling authority has established a contrary ruling of law. *Rothner*, 929 F.2d at 301 n.6. Neither of these exceptions is applicable to this case.

[6] *See United States v. Townsend*, 73 F.3d 747, 754 (7th Cir. 1996) (stating that "question whether the district court considered the appropriate factors" in reaching a legal conclusion is reviewed de novo); *In re Love*, 957 F.2d 1350, 1359 (7th Cir. 1992) (stating that correctness of district court's methodology
(continued...)

district court's use of that methodology by its application of the facts of the case to the legal standard we enunciated in *Pennington I*. Our review of the district court's assessment of the facts in light of those legal standards is subject to deferential review.[7]

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[6] (...continued)
in assessing facts is a question of law); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 973 (7th Cir. 1991) (stating that de novo review is appropriate in reviewing the district court's methodology); *cf. Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982) (noting that district court's findings that rest on an erroneous view of the law may be set aside on that basis); *FDIC v. Bierman*, 2 F.3d 1424, 1431 (7th Cir. 1993) (stating that questions of law are reviewed de novo).

[7] *See Cooter & Gel v. Hartmarx Corp.*, 496 U.S. 384, 401-05 (1990) (stating that mixed question of law and fact should be reviewed for an abuse of discretion); *Pierce v. Underwood*, 487 U.S. 552, 559-61 (1988) (same); *Carle Found. Hosp. v. Shalala*, 57 F.3d 597, 599 (7th Cir. 1995) (noting that mixed question of law and fact is reviewed in a deferential manner—"whether the initial decisionmaker is a district court or an administrative agency") (internal citations omitted); *G.J. Leasing Co. v. Union Elec. Co.*, 54 F.3d 379, 382 (7th Cir. 1995) (stating that mixed questions of law and fact set aside on appeal only if clearly erroneous); *Bierman*, 2 F.3d at 1432 (noting that the clearly erroneous standard is well established in this circuit's appellate review of mixed questions). *But cf. In re Krehl*, 86 F.3d 737, 742 (7th Cir. 1996) (noting the possible effect of *Ornelas v. United States*, 116 S. Ct. 1657, 1662-63 (1996), on some mixed questions beyond the Fourth Amendment context). We note further that after *Ornelas* the preferable term for the standard of review of mixed questions in these contexts appears to be abuse of discretion because "'[c]lear error' is a term of art derived from Rule 52(a) of the Federal Rules of Civil Procedure, and applies when reviewing questions of fact." *Ornelas*, 116 S. Ct. at 1661 n.3.

3.

Our directions to the district court were plain. Our remand required the court to determine "whether section 237 insures the greatest promptness in paying unemployment benefits that is administratively feasible, making all factual findings that it deems necessary to the resolution of that issue." *Pennington I*, 22 F.3d at 1388. To make this determination, we held that it was necessary for the district court "to decide whether section 237's base period strikes a reasonable balance between the plaintiff class's interest in prompt payment of unemployment insurance benefits and the state's interest in minimizing the costs of eliminating delay and in preventing fraudulent claims." *Id.* at 1387 (internal quotation and citation omitted). In formulating this direction to the district court, we, in turn, were obliged to follow another mandate—the mandate of Congress as interpreted by the agency charged by law with the administration of the statute.[8] As we noted in *Pennington I*, federal law requires that state unemployment benefits be determined under a system that is "reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1). In fulfilling his own responsibilities to administer this statutory directive, the Secretary has interpreted this statutory mandate to require the states to adopt methods of administration that will reasonably insure that benefits to eligible claimants are paid "with the greatest promptness

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[8] *See Connecticut Dep't of Income Maintenance v. Heckler*, 471 U.S. 524, 532 (1985); *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 153-54 (1946); *Wilkins v. Sullivan*, 889 F.2d 135, 139 (7th Cir. 1989). *See generally Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

that is administratively feasible." 20 C.F.R. § 640.3(a).[9] The Secretary has further noted that "implicit in prompt performance with respect to benefit payments is the corresponding need for promptness by the State in making determinations of eligibility." 20 C.F.R. § 640.1(a)(2).

Given the deference that we owe the Secretary's interpretation of the statute which he is charged with administering, these regulatory directives were the foundation of our direction to the district court. Fundamentally, the judicial task is to determine whether the defendant has fulfilled the statutory duty of implementing a system that ensures the payment of compensation with the "greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a). We therefore required the district court to examine the evidence and to determine whether the Illinois scheme strikes a reasonable balance between the plaintiff class' interest in prompt payment and the state's interest in minimizing the costs of delay and in preventing fraudulent claims. The Secretary's regulations provide some guidance in this endeavor. But they could provide a great deal more, and perhaps they should. This determination of whether to provide more explicit guidance, however, is not ours to make; it is reserved for the Secretary and the Congress in its oversight of his administration of the statute. We must work with the tools that have been given us and remember

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[9] The Secretary's interest in prompt payment is supported by the congressional intent and the legislative history of the SSA. The Supreme Court, in *California Dep't of Human Resources Dev. v. Java*, stated that the "objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee." 402 U.S. 121, 130-31 (1971). The Court recognized that, although "probably no program could be devised to make insurance payments available precisely on the nearest payday following the termination," that result was the goal of Congress. *Id.*

that our ultimate task is to determine the will of Congress and to see that it is fulfilled by the litigants before us.[10]

B.

We do not believe that the methodology employed by the district court was infirm. The district court noted explicitly that its task was to determine whether the current Illinois system struck a reasonable balance between the interest of the class members in prompt payment and the interest of the state in determining eligibility without incurring unreasonable costs of administration or in preventing fraudulent claims. As the district court noted, the parties agree that, in order to achieve that objective, the court needed to weigh the increase in the benefits that would be paid to members of the class (both in terms of increased dollar amounts and in increased recipients) against the increase in costs of administration to the State in implementing and operating such a system. We think that the district court correctly determined that, to accomplish this task, it needed to con-

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[10] *See Marlowe v. Bottarelli*, 938 F.2d 807, 812 (7th Cir. 1991) ("Intent is, of course, at the heart of the judicial inquiry because the courts endeavor to give effect to the designs of Congress and the agencies to which the legislature has delegated authority. In discerning intent, courts traditionally focus on the language of statutes and regulations because we presume that legislatures and agencies mean what they say . . . .") (internal citations omitted); *United States v. Markgraf*, 736 F.2d 1179, 1182 (7th Cir. 1984) ("Our task, then, is the same as it is in any case involving statutory interpretation: to determine congressional intent. In determining this intent, courts customarily look to several factors: the language of the statute; the legislative history; and the interpretation given by the administrative agency . . . ."), *cert. dismissed*, 469 U.S. 1199 (1985).

sider the availability of alternate schemes and to determine whether those schemes provided a more favorable balance between the number of benefit recipients and the amount of benefits received, on the one hand, and the cost inherent in the administration of such a plan, on the other. IDES never satisfactorily explains how the district court could have accomplished its ultimate objective of determining whether the present Illinois scheme was compatible with the intent of Congress without undertaking such a comparative analysis. Nor do we believe that the district court impermissibly deviated from its assigned task in the course of making this comparison. A reading of the district court's order in its entirety makes clear that it understood its objective: to determine whether the Illinois scheme comported with the demands of the statute and regulations. The court carefully compared the capacity of the current system to fulfill the command of the statute against the capacity of available alternatives to achieve the same goal. It found the present scheme wanting.

In its submission before us, IDES claims that the district court did not give adequate consideration to the drawbacks of the alternative systems. In assessing this criticism, we must remember that the district court was obliged to focus upon only those factors that helped it assess whether the alternate scheme in question produced prompter payment in an administratively feasible manner. It is clear that the court did consider those drawbacks which were relevant to the task before it—the comparative financial burden on the state from the administration of each system.[11] The issue before the court

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[11] As noted earlier, *see supra* note 3, the district court also recognized the relevance of a comparison of the number of fraudulent claims in each system, but it was not presented with evidence that an ABP system would increase fraud.

was not whether IDES had a preference for a particular system for reasons unrelated to the statutory mandate; the issue was whether the current method of eligibility determination fulfilled the command of the statute. The district court properly limited its focus to whether the alternates resulted in the prompter payment of compensation to which the recipients have a right and whether the plan was administratively feasible. The statutory command of the SSA was the sole and appropriate focus of the court's inquiry. There is, therefore, no merit to IDES' argument that the alternates suggested by the plaintiff class ought to be rejected because they produce a paper delay that is longer than the paper delay caused by the current system. The district court quite properly focused on the actual delay in the receipt of benefits under each method and determined that there was less delay under the alternative scheme.

Upon examination of the district court's order, the record and the briefs of the parties, we must conclude that the district court correctly implemented our mandate. After a careful assessment of the evidence, it determined that the current Illinois scheme for determining unemployment eligibility does not fulfill the statutory mandate as interpreted by the Secretary. Given the existence of alternatives that deliver prompter payment without creating significant administrative burdens, the deprivation of compensation, which under the law the recipients are entitled to receive "when due," cannot be justified.

Conclusion

Accordingly, the judgment of the district court is affirmed.

AFFIRMED

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: April 4, 1997

BEFORE:

Honorable JESSE E. ESCHBACH, Circuit Judge
Honorable KENNETH F. RIPPLE, Circuit Judge
Honorable MICHAEL S. KANNE, Circuit Judge

No. 96-1499

LUELLA PENNINGTON, individually and on behalf of other similarly situated persons,

Plaintiff-Appellee

v.

LYNN DOHERTY, Director of the Illinois Department of Employment Security, in her official capacity,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 85 C 6327, Paul E. Plunkett, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-3725

LUELLA PENNINGTON, individually and on behalf of other similarly situated persons,

Plaintiffs-Appellants,

v.

LOLETA DIDRICKSON,* Director of the Illinois Department of Employment Security,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 6327—**Paul E. Plunkett**, *Judge.*

ARGUED OCTOBER 26, 1993—DECIDED APRIL 11, 1994

Before ESCHBACH, RIPPLE and KANNE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* The plaintiffs are a certified class of unemployment insurance claimants who brought action under 42 U.S.C. § 1983 against the Illinois Department of Employment Security ("IDES"). The plaintiff class chal-

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* During the pendency of this case, Loleta Didrickson succeeded Sally Ward as Director of the Illinois Department of Employment Security. Director Didrickson has been substituted for her predecessor pursuant to Federal Rule of Appellate Procedure 43(c)(1).

lenges the definition of "base period" in section 237 of the Illinois Unemployment Insurance Act (the "IUIA"), 820 ILCS 405/237. It maintains that the definition violates the "when due" clause of section 303(a)(1) of the Social Security Act (the "SSA"), 42 U.S.C. § 503(a)(1). Following a bench trial, the district court entered judgment for IDES. For the reasons that follow, we reverse and remand the case to the district court.

I

BACKGROUND

A. *Statutory Scheme*

Although unemployment insurance is administered at the state level, the SSA makes federal funds available to the states to encourage them to enact unemployment insurance laws. However, before the federal government will provide funds for a state to administer its unemployment insurance programs, the Secretary of Labor must certify that a recipient state's program meets certain statutory requirements. *See* 42 U.S.C. §§ 502, 503(b)(2), 504. One of those requirements is the "when due" clause of section 303(a)(1) of the SSA; it requires a state's unemployment insurance laws to provide for "such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1). Department of Labor regulations state that the "when due" clause requires a state to provide for such "methods of administration as will reasonably insure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a). Although "[f]ederal laws provide no authority for the Secretary of Labor to determine the eligibility of individuals under a State law," the regulations make clear that "implicit in prompt performance with respect to benefit payments is the corresponding need for promptness by the State in making determinations of eligibility." 20 C.F.R. § 640.1(a)(2).

In Illinois, an eligible unemployment insurance claimant can draw benefits in "the one-year period beginning with the first day of the week with respect to which the individual first files a valid claim for benefits." 820 ILCS 405/242. This is known as a claimant's "benefit year." *Id.* However, in order to file a "valid claim" for unemployment insurance, a claimant must have earned sufficient wages during the claimant's "base period."[1] Section 237 of the IUIA defines a "base period" as "the first four of the last five completed calendar quarters immediately preceding the benefit year." 820 ILCS 405/237. Thus, section 237's base period excludes the wages a claimant earns in the quarter immediately preceding the quarter in which a claimant files (the fifth quarter, or the "lag quarter") and excludes the wages a claimant earns in the quarter in which the claimant files (the sixth quarter, or the "filing quarter"). For example, for a claimant who filed for benefits in June 1993 (the second calendar quarter of 1993), the resulting base period would have been the four calendar quarters of 1992; the first quarter of 1993 would have been the claimant's lag quarter, and the second quarter of 1993 would have been the claimant's filing quarter. Pursuant to section 237's base period, IDES would consider only the wages the claimant earned in the four calendar quarters of 1992 in determining the claimant's eligibility for unemployment insurance.[2]

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[1] Under section 500E of the IUIA, a claimant must have earned at least $1,600 in the entire "base period" and must have earned at least $440 of that $1,600 outside the calendar quarter in which the claimant's wages were the highest. 820 ILCS 405/500E. For example, if a claimant earned $1,600 over the four calendar quarters that constituted that claimant's base period, the claimant must not have earned any more than $1,160 in any one quarter. Otherwise, the claimant would not have satisfied section 500E's requirement that at least $440 be earned outside the calendar quarter in which the claimant earned the most wages.

[2] To illustrate, the following represents the base period of a claimant who filed for unemployment insurance in June 1993:

(Footnote continued on following page)

Illinois uses its base period scheme because it is a "wage record system" state. Under this system, employers covered by the IUIA report the gross wages of all their employees to the state unemployment security agency on a quarterly basis. Employers must report their employees' wages by the last day of the month following the quarter in which the wages were paid. As a result, IDES experiences peak periods that begin about one week prior to the end of the reporting month; the peak periods last about 3 to 8 weeks with an additional week to process delinquent reports. App. VII at 70-71 (Stipulated Facts). The gap created by the base period in section 237 of the IUIA (i.e., the gap between the end of a claimant's base period and the beginning of a claimant's benefit year) gives employers in a wage record system time to report wage information to the state agency and gives the state agency time to make that information available to local unemployment insurance offices. App. VII at 66-67.

Although a wage record system is the most common system in the United States, some states use a "wage request system," under which a state requests a claimant's wage information from the claimant's employer when the claimant files for unemployment benefits. Because a state agency under this system handles only wage information needed to adjudicate each particular claim, a state agency can request the most recent wage information for each claimant, thereby obviating the need for a substantial gap between the end of a claimant's base period and the beginning of a claimant's benefit year. App. VII at

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[2] *continued*

1st Quarter	(Jan.-Mar. 1992)	earnings considered
2nd Quarter	(Apr.-June 1992)	earnings considered
3rd Quarter	(July-Sept. 1992)	earnings considered
4th Quarter	(Oct.-Dec. 1992)	earnings considered
5th Quarter	(Jan.-Mar. 1993)	earnings not considered (lag quarter)
6th Quarter	(Apr.-June 1993)	earnings not considered (filing quarter)

67-68. Finally, some states move their base periods. Under this approach, when a claimant has insufficient qualifying wages in the first four of the last five completed quarters under an IUIA section 237-type base period, the state agency redetermines the claim based on wages earned in the four completed calendar quarters immediately preceding the filing quarter. App. VII at 68.

B. *Luella Pennington*

Luella Pennington is the class representative for the unemployment insurance claimants. She filed a claim with IDES for unemployment insurance on June 7, 1984, the second quarter of 1984. Under IUIA section 237, Ms. Pennington's base period was January 1, 1983 to December 31, 1983, the four calendar quarters of 1983. Because Ms. Pennington had not earned sufficient qualifying wages in her section 237 base period, IDES denied her application. Ms. Pennington remained unemployed and therefore filed a second claim on October 5, 1984, the fourth quarter of 1984. Her base period for this application encompassed the third and fourth quarters of 1983, and the first and second quarters of 1984. She was entitled to benefits this time because she had earned enough section 500E qualifying wages in the first two quarters of 1984.

Section 237's base period required Ms. Pennington to wait until October 5, 1984 to claim benefits. If IDES had considered lag quarters in determining qualifying wages, Ms. Pennington could have successfully refiled on July 2, 1984, the third quarter of 1984, because IDES would have considered the first two quarters of 1984 in determining her qualifying wages. Instead, she had to wait to file in October 1984, the fourth quarter of 1984, in order to have both the first and second quarters of 1984 considered as qualifying wages under the section 237 base period. Ms. Pennington therefore brought a § 1983 action against IDES on behalf of herself and all others similarly situated alleging that section 237's base period violates the "when due" clause of the SSA. The plaintiff class's first complaint

alleged that it was "administratively feasible," 20 C.F.R. § 640.3(a), for IDES to include as the four-quarter base period both the lag quarter and, if necessary, the filing quarter. The class's second amended complaint, however, alleges only that it would be administratively feasible for IDES to consider the lag quarter in calculating a claimant's qualifying wages, thus making the base period the four calendar quarters immediately preceding the filing quarter.

C. *District Court Proceedings*

IDES moved to dismiss the plaintiff class's complaint and moved for summary judgment. One of IDES's main arguments was that section 237 is not an administrative method subject to the "when due" clause, but rather is an eligibility provision, which Congress left the states to determine. Section 237, IDES submitted, is a monetary eligibility provision which defines the class of claimants to whom payments are due. Because Ms. Pennington and the plaintiff class had insufficient qualifying wages under section 237, they were not "due" anything. IDES thus claimed that the "when due" provision was inapplicable because it applies only after a claimant has been deemed eligible for benefits under state law. The district court denied IDES's motions, as well as its motion to reconsider. In its June 13, 1989 Memorandum Opinion and Order, the court relied on *Jenkins v. Bowling*, 691 F.2d 1225 (7th Cir. 1982), and stated that the "when due" clause requires prompt determination of eligibility as well as prompt payment of benefits to eligible claimants. June 13, 1989 Mem. Op. at 7-8.

The case proceeded to a bench trial in October 1990. Although the parties stipulated to many facts, procedures, and issues, each side presented evidence concerning the "administrative feasibility" of implementing an alternative

base period definition.[3] In an October 21, 1992 Memorandum Opinion and Order, issued two years after the bench

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[3] The plaintiff class's expert witness, Peter Kauffman, conceded that, based on the speed of claim processing, the control of fraud, and the cost of administration, the wage record system which IDES currently uses is a better method than the wage request system. However, Kauffman testified that there existed an administratively feasible method, which he termed "Alternative I," by which IDES could minimize the delay caused by section 237's base period. The heart of Alternative I consists of using a movable base period on a limited basis. Whenever a claimant lacked sufficient qualifying wages in the section 237 base period, IDES could make a determination of a claimant's qualifying wages based on the wages a claimant earned in the lag quarter. Thus, Alternative I's base period for claimants with insufficient wages in the section 237 base period would be a moved base period comprised of the four calendar quarters immediately preceding the filing quarter (i.e., the second, third, and fourth quarters of the section 237 base period plus the lag quarter).

Because employers need report their employees' wages only by the last day of the month following the quarter in which the wages were paid, a claimant's lag quarter wages will not always be posted in the first few weeks of the claimant's filing quarter. (Kauffman's study found that 16% of a completed quarter's wage data is processed and available by the end of the fourth week of the following quarter; 73% is available at the end of the eighth week.) Under Alternative I, therefore, when a claimant files who does not have sufficient qualifying wages in the claimant's section 237 base period, IDES first would run a "threshold" test using the wage information from the second, third, and fourth quarters of the section 237 base period. If the claimant had not earned at least $440 in those three quarters, the claimant would be ineligible by statute for benefits regardless how much the claimant earned in the lag quarter. *See supra* note 1 (discussing monetary eligibility requirements of IUIA section 500E). According to Kauffman, this threshold test would eliminate two-thirds of those without qualifying wages under section 237 from further consideration. If a claimant's lag quarter wages were not processed and available, and that claimant passed the section 500E threshold test, IDES's computer would issue a monetary finding as soon as the lag quarter wages were posted. Of course, for those claimants whose lag quarter wages were posted when they filed their claim and who did not have

(Footnote continued on following page)

[3] *continued*
sufficient qualifying wages under section 237, IDES's computer would issue a second finding of eligibility on the basis of the movable base period comprised of the four completed calendar quarters preceding the filing quarter. Under Alternative I, those claimants who had sufficient qualifying wages in the four quarters preceding the filing quarter would receive unemployment insurance benefits retroactive to their initial claim.

Kauffman also set out in his testimony two other possible methods. "Alternative II" would consist of speeding administration of Alternative I by sending wage requests to employers of claimants who applied in the first month of the filing quarter, whose lag quarter wages were not posted at application time, and who passed the threshold test. "Alternative III" would do the same for all such claimants, not just those who applied in the first month of the filing quarter. Kauffman testified that the marginal expense of these two alternatives, in comparison with Alternative I, exceeded their marginal benefits.

Both the plaintiff class and IDES presented evidence on the costs of implementing the movable base period of Kauffman's Alternative I. Kauffman testified that only one additional IDES staff person would be necessary to execute Alternative I. In addition, Kauffman stated that one-time computer conversion costs would be $50,000 for equipment and $40,000 for one computer programmer's compensation. IDES's expert witness, on the other hand, Michael Marshman, estimated that the cost of computer conversion under Alternative I would run approximately $2 million. Melissa Barton, manager of IDES's computer, estimated that computer conversion would run about $1.7 million and that IDES would need to employ three or four additional programmers.

Finally, both sides stipulated that, in 1986, 526,469 claimants filed unemployment benefits applications with IDES. IDES denied 63,518 claimants benefits because they lacked qualifying wages; however, 15,034 of those denied would have had sufficient qualifying wages if IDES had counted the wages they had earned in the lag quarter, as would be the case under the plaintiff class's Alternative I. Moreover, an additional 9,115 claimants would not have been denied benefits in 1986 if section 237's base period included the wages they had earned in their filing quarters. Under Alternative I, which includes lag quarter wages, these claimants could have filed a valid claim for benefits three months sooner than under the section 237 base period. *See* App. VII at 66 (Stipulated Facts).

trial, the district court handed down its judgment in favor of IDES. However, instead of assessing the evidence at trial and making express findings of fact on the issue of administrative feasibility, the district court reversed its earlier decisions and ruled that section 237 was an eligibility requirement. As such, the district court held that IDES was entitled to judgment as a matter of law. The court reasoned that claimants who do not have sufficient qualifying wages under section 237's base period, but who would if lag quarter wages were included in IDES's determination, do not experience any "delay" in receiving benefits because those benefits are not "due." Mem. Op. at 12. Rather, such claimants are "simply ineligible" for benefits at the time they apply. Mem. Op. at 11. Thus, according to the district court, section 237 is not an administrative method subject to the "when due" clause of section 303(a)(1) of the SSA, but rather a "valid eligibility" provision, the content of which Congress has left to the states. The district court, however, did not end its discussion at that point. Although it had already held as a matter of law that section 237 was not subject to the "when due" clause, the district court proceeded to make a brief determination of whether the delay section 237's base period creates is justifiable under the "when due" clause. The court stated that, because section 237's base period did not create an "infinite delay," *Jenkins v. Bowling*, 691 F.2d 1225, 1229 (7th Cir. 1982), section 237 did not violate the "when due" clause or any corresponding regulations. Oct. 21, 1992 Mem. Op. at 15.

II

ANALYSIS

On appeal, we must determine de novo whether the definition of base period in IUIA section 237 is an administrative method subject to the "when due" clause of the SSA and its corresponding regulations, or whether it is an eligibility provision and thus beyond the reach of the

"when due" clause.[4] If we determine that section 237's base period is an administrative method, we must weigh the burdens and benefits of section 237 against the burdens and benefits of the plaintiff class's proposed movable base period to determine whether section 237 "reasonably insure[s] the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a).

A. *Section 237: Eligibility Provision or Administrative Method?*

1.

At the outset, we must address an initial argument of IDES, and of the Secretary of Labor as amicus curiae in support of IDES. IDES submits that, because a federal court lacks the authority to rewrite a state statute such as IUIA in granting an injunctive remedy, we therefore cannot grant relief to the plaintiff class in this case. IDES acknowledges that a federal court can enjoin the practice or use of a state statutory provision that violates the "when due" clause. *See, e.g., California Dep't of Human Res. Dev. v. Java*, 402 U.S. 121, 135 (1971) (enjoining California statute which provided for the withholding of insurance benefits upon an employer's appeal from the initial eligibility determination because it violated the "when due" clause). However, IDES argues that the plaintiff class's suit seeking to enjoin IUIA section 237 as applied to the class should be dismissed because the relief the class seeks

[4] The plaintiff class concedes that valid state eligibility requirements, such as "voluntary leaving," 820 ILCS 405/601, are not subject to the SSA's "when due" clause. Appellants' Br. at 25 ("[A] state does not violate the 'when due' clause by delaying payment of benefits to enforce provisions that govern eligibility.") (citing 20 C.F.R. § 640.1(a)(2) (stating that "applicable federal laws provide no authority for the Secretary of Labor to determine the eligibility of individuals under a State law")); *see also Jenkins*, 691 F.2d at 1229 (stating that "the state has a legitimate interest in enforcing its valid eligibility criteria").

cannot be effected by merely enjoining section 237. Rather, IDES states that, because section 237 would remain in effect for the great majority of unemployment insurance claimants, the only remedy that would give the plaintiff class relief is the ordering of a special alternative base period. Such equitable relief, IDES contends, is an inappropriate remedy to impose on a sovereign state. *Cf. Jenkins*, 691 F.2d at 1234 (ordering the district court to enjoin the IUIA provision at issue but to do so in a judgment that "does not specify the exact measures that the state must take to bring itself into compliance with the law").

We cannot accept this argument. Although it is doubtless true that a federal court lacks the authority to rewrite IUIA section 237 for the Illinois General Assembly, relief can be granted to the plaintiff class in this case without doing so. Although the plaintiff class has tendered an alternative base period system, the remedial options open to the district court are not limited to entering an injunction ordering IDES to implement that alternative base period. Indeed, the plaintiff class does not even urge that such relief be granted. Rather, the proposed alternative base period is merely the plaintiff class's illustration that section 237's base period, as applied to the plaintiff class, violates the timeliness directive of the "when due" clause because a more prompt method of determining qualifying wages is administratively feasible. Thus, if it is determined that section 237 is an administrative provision and not an eligibility requirement, and if it is determined that there exists an administratively feasible alternative method by which to determine qualifying wages more promptly, the appropriate remedy will consist only of enjoining section 237 as applied to the plaintiff class. Because "the state should be permitted to decide, in the first instance, how [section 237] can be altered to comply with section 303(a) of the Social Security Act," it would be in the hands of the state to implement "the exact measures that the state must take to bring itself into compliance with the law." *Id.*

2.

The Secretary of Labor, appearing in this court as amicus curiae, notes at the outset of his presentation that it is clear that Congress intended that the states have "free rein" in designing the eligibility criteria for their respective unemployment programs. This statement is undoubtedly true. *See New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 539 (1979) (plurality opinion) (stating that "Congress has been sensitive to the importance of the States' interest in fashioning their own unemployment compensation programs and especially their own eligibility criteria"); *Jenkins*, 691 F.2d at 1232 (acknowledging "the state's competing interest in enforcing its eligibility criteria, the validity of which is not questioned"). Nevertheless, this truism simply begs the question and, consequently, contributes nothing to the inquiry before us. Rather, we must address an antecedent issue—whether IUIA section 237 is an eligibility requirement rather than an administrative matter subject to the "when due" clause.

The Secretary argues that, because Congress noted the existence of lag periods while attempting to remedy the problem of so-called "double dipping," we ought to conclude that Congress determined that such periods are indeed acceptable. *Cf. Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845-46 (1986) ("It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.' ") (citation omitted). We do not believe that it is appropriate to read such a determination into Congress' selection of another remedy for that problem. Congress' decision to deal with the so-called "double dipping" problem by requiring intervening work rather than abolishing lag periods cannot fairly be characterized as a focused congressional examination of the problem before us in this litigation. Consequently, that decision does not counsel us to conclude that Congress has revisited this area and declined consciously

to address the problem that the litigants are now addressing in this litigation. Indeed, the provision upon which the Secretary relies amended the Federal Unemployment Insurance Tax Act, 26 U.S.C. §§ 3301 *et seq.* The legislation had nothing to do with the operation of the "when due" clause and certainly did not address the issue of whether the type of base periods used in the Illinois statute violated that clause. When there is no indication that Congress has focused on the matter, legislative silence is indeed a very poor guide to the discernment of legislative intent. *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969).

The Secretary also reminds us that we are obliged to defer to the interpretation given a statute by the agency charged with the responsibility for administering it so long as the agency's interpretation of the statute is based upon a permissible reading of that statute. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984); *accord National R.R. Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1401 (1992). Our cases certainly demonstrate loyal adherence to that principle. *See, e.g., Hanson v. Espy*, 8 F.3d 469, 472-73 (7th Cir. 1993); *United States v. Baxter Health Care Corp.*, 901 F.2d 1401, 1407 (7th Cir. 1990); *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 906-07 (7th Cir. 1990). Nevertheless, we have never interpreted this principle as a direction to approach our review of all government positions with a rubber stamp. For instance, along with the other circuits, we have distinguished between agency positions developed in the heat of litigation and those that reflect the deliberate attempt of the agency to implement the will of Congress through the regulatory process. *See, e.g., Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers*, 3 F.3d 994, 1003 (7th Cir. 1993) (declining to defer to agency's amicus brief when the agency had not issued any regulation or opinion on the subject because "[c]ourts do not defer to 'agency litigating positions that are wholly unsupported by regulations, rulings or administrative practice' ") (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)), *petition for cert. filed*, 62 U.S.L.W.

3378 (U.S. Nov. 12, 1993) (No. 93-768). Similarly, we have distinguished between those statements of legislative intent that the agency embodies in formal regulations[5] and that, consequently, have the benefit of careful crafting and comment, and those more informal statements that do not necessarily reflect the deliberate focus of the entire agency on the issue of congressional intent. *See, e.g., Doe v. Reivitz*, 830 F.2d 1441, 1446-47 (7th Cir. 1987) (stating that interpretive documents "are not entitled to the same degree of deference commanded by the high-powered regulations reviewed in *Chevron*"), *amended*, 842 F.2d 194 (7th Cir. 1988); *see also Hanson*, 8 F.3d at 472 n.3 (7th Cir. 1993) (noting same); *Metropolitan School Dist. v. Davila*, 969 F.2d 485, 490 (7th Cir. 1992) (same), *cert. denied*, 113 S. Ct. 1360 (1993).

We are mindful of our obligation to defer to the interpretation of the agency whenever that interpretation can be said to embody a deliberate and considered interpretation of the legislative intent. We therefore have examined with great care the sources that, in the agency's view, evidence its longstanding view that issues of lag periods are matters of eligibility and therefore are not subject to the "when due" clause and, indeed, are within the exclusive responsibility of the states. At the outset, we think it is important to note that the Secretary does not invite our attention to any instance in which, by formal regulation, the agency has squarely stated that the length of lag periods is a matter of eligibility within the exclusive authority of the states. Certainly, the simple definitional section for "base period" defines that period as "the period as determined under the applicable state law for the individual's applicable benefit year." 20 C.F.R. § 615.2(b). But this definition hardly qualifies as an explicit determination by the Secretary that lengthy lag periods are beyond the scope of the "when due" clause.

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[5] *See Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977) (noting that regulations issued by an agency under statutory authority have the force and effect of law).

The Secretary also submits that the position of the agency can be discerned from certain "draft bills" provided to the states at the time of the initial enactment of the legislation in 1937 and again in 1950. In support of its position, the agency stresses that these "drafts" were merely advisory in nature and that the accompanying explanation explicitly recognized that it was the right and the responsibility of the states to decide "what kind of legislation it desires and how it shall be drafted." We recognize that particular deference is due to an agency pronouncement that " 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently, and smoothly while they are yet untried and new.' " *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408 (1961) (citation omitted); *see also Udall v. Tallman*, 380 U.S. 1, 16 (1965). In the case before us, however, it must be admitted that the "pronouncements" at issue are, to put it mildly, ambiguous evidence of the Secretary's interpretation. Although one of the drafts does include a lag period like the one in the present Illinois statute, by the Secretary's own admission, these "draft bills" were advisory in nature and hardly can be accorded the same weight as that given the formal regulations of the department. *See Ohio Bureau of Employment Serv. v. Hodory*, 431 U.S. 471, 485 (1977) (declining "to read implications of the draft bills into the Social Security Act").

These "draft bills" do not, moreover, directly address the issue here: whether the lag period arrangement can be termed a matter of eligibility as opposed to a matter of administration.[6] We are asked to imply that the general

[6] The Secretary has made use of the draft bills to demonstrate that a lag period such as IUIA section 237 is an eligibility provision and not an administrative method. However, we also note that, if such a lag period is an administrative method and not an eligibility provision, the mere fact that the draft bills take notice of a lag period similar to IUIA section 237 does not indicate that

(Footnote continued on following page)

statement—that the state has the right to decide the contours of its own legislation—establishes that the agency regards the lag period as a matter of eligibility rather than an administrative matter. It must be remembered, however, that the states also have a great deal of latitude with respect to administrative matters, although that discretion is cabined somewhat by the strictures of the "when due" clause. One must read a great deal into the "draft bills" to determine that such a statement is a short hand for a definitive agency determination that the lag period issue is not subject to the "when due" clause.

An additional ambiguity in the Secretary's position must also be noted. If the matter of the lag periods is beyond the scope of the "when due" clause and therefore not a matter within the responsibility of the Secretary, it is difficult to understand why the agency found it necessary to devote such a great deal of effort to a matter not within its cognizance. As we have noted, the matter of lag times is addressed in the "draft bills." Again, in a 1962 policy statement, the agency addressed the matter and counseled the states agencies that lag periods ought to be as short as possible. While these agency utterances do not establish that the agency has treated lag periods as a matter of administration, they certainly cast a great deal of doubt on the proposition that the agency has taken the opposite position and consistently has treated the device as a matter of eligibility, the sole concern of the state. Absent definitive guidance from the Secretary, we must rely more heavily on the caselaw which has dealt with the issue, to which we now turn.

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[6] *continued*
that lag period is in compliance with the "when due" clause or the corresponding regulations. A state must pay unemployment benefits "with the greatest promptness that is administratively feasible." 29 C.F.R. § 640.3(a). Needless to say, what was "administratively feasible" when the draft bills were written—1937, 1950, and 1962—is much different from what is administratively feasible in today's technologically advanced world.

3.

The plaintiff class submits that several cases demonstrate section 237 to be an administrative provision. In *Fusari v. Steinberg*, 419 U.S. 379, 388 n.15 (1975), a district court had interpreted a prior Supreme Court summary affirmance in *Torres v. New York Department of Labor*, 405 U.S. 949 (1972), as standing for the proposition that "benefits are not 'due' under § 303 until administratively deemed payable." The Supreme Court stated that such an interpretation of the "when due" clause "would nullify the congressional intention of requiring prompt administrative provision of unemployment benefits." *Fusari*, 419 U.S. at 388 n.15; *see also Wilkinson v. Abrams*, 627 F.2d 650, 661 n.14 (3d Cir. 1980) ("We find no merit in the Secretary's argument that the 'when due' requirement of § 303(a)(1) . . . does not apply until a claimant has first been administratively determined to be eligible for unemployment compensation benefits.").

The plaintiff class also relies on our decision in *Jenkins*, 691 F.2d at 1229, in which we relied on *Fusari* in rejecting the same argument IDES presents in this case, albeit in the context of a different section of the IUIA. The proviso at issue in *Jenkins* concerned eligibility decisions for unemployment insurance claimants who had allegedly been discharged because of a felony or theft in connection with the claimant's work. *Id.* at 1227. The proviso, IUIA section 602 B, stated that "the determination of [the affected claimant's] benefit rights shall be held in abeyance pending the result of any legal proceedings arising therefrom." *Id.* IDES argued that the "when due" clause did not apply to that proviso

> because benefits do not become due until the criminal charges are resolved; in [IDES's] view the held in abeyance proviso postpones the determination of eligibility, rather than the payment of benefits to eligible persons.

Id. at 1229. We rejected IDES's argument. We stated that it would unduly limit the "when due" clause to narrow

issues of payment mechanisms, thereby precluding the use of the clause as a means of effectuating the purposes of the SSA (i.e., prompt determination and payment of unemployment insurance to achieve "humane" and "macroeconomic" objectives). *Id.* The plaintiff class thus submits that *Jenkins* demonstrates that the "when due" clause requires prompt eligibility determinations, not just prompt payment of benefits. *See id.* ("We think Congress had larger objects in view than the ministerial competence of state comptrollers."). Moreover, the class asserts that *Jenkins* shows that IDES cannot make an end-run around a functional analysis of section 237 merely by labelling it an eligibility provision. Rather, section 237's purposes must be studied to determine whether it is subject to the "when due" clause.

The plaintiff class notes that, according to the Supreme Court, valid eligibility criteria "define the class of persons eligible for benefits." *Ohio Bureau of Employment Serv. v. Hodory*, 431 U.S. 471, 486-87 (1977). By contrast, the class maintains that section 237's base period does not define the class of eligible claimants. Instead of determining *what* earnings IDES will consider, section 237 determines *when* IDES will count those earnings as qualifying wages. This is demonstrated, the class asserts, by the fact that a claimant not yet eligible for benefits owing to section 237's lag quarter need only wait to become eligible in the future. By contrast, a claimant ineligible under a valid eligibility criterion, such as the IUIA "voluntary leaving" provision, must affirmatively rectify the situation by, in this example for instance, "becom[ing] reemployed and ha[ving] had earnings equal to or in excess of his weekly benefit amount in each of four calendar weeks." 820 ILCS 405/601. Finally, the plaintiff class states that both sides agree that valid eligibility criteria measure a claimant's "continued and current attachment to the labor force." *Fleiszig v. Board of Review*, 104 N.E.2d 818, 821 (Ill. 1952). However, the class submits that section 237's base period causes class members with relatively strong attachment to the work force to wait until that attach-

ment has weakened before they can receive benefits, and causes some to receive no benefits at all (e.g., claimants who find employment before the delay created by the lag quarter is over).

IDES submits that the district court correctly held that section 237 is a valid eligibility requirement beyond the reach of the "when due" clause and corresponding regulations, not an administrative method. In its view, the cases that have found state unemployment insurance provisions to conflict with the "when due" clause have all dealt with situations in which an initial determination of eligibility had been made, thus making payment in those cases "due" and hence subject to the "when due" clause. In *California Department of Human Resources Development v. Java*, 402 U.S. 121, 133 (1971), for example, the Court held that a California procedure which suspended payments for a median period of seven weeks pending administrative appeal violated the "when due" clause; however, the statute violated the prompt payment requirement "after an initial determination of eligibility." IDES attempts to distinguish *Fusari* on the grounds that each plaintiff in that case "had filed a valid initiating claim and received benefits for a period of time." *Fusari*, 419 U.S. at 382 n.3. IDES concedes that *Jenkins* stated that benefits cannot be delayed by postponing eligibility determinations; however, it contends that no delay in eligibility status has occurred, because claimants such as the plaintiff class are simply ineligible when they apply. Finally, like the plaintiff class, IDES submits that eligibility criteria measure attachment to the work force. Unlike the class, though, IDES submits that section 237's base period, like other eligibility criteria, aids in excluding those claimants with the most tenuous attachment to the work force.

Although IDES's contention concerning section 237's status as an eligibility provision is "not an absurd argument," *Jenkins*, 691 F.2d at 1229, we cannot accept it. First, IDES cannot persuasively distinguish *Jenkins*. In addressing the same argument in essentially the same context, we recognized in *Jenkins* that such an argument would

render the "when due" clause a virtual nullity, limiting it to those cases "where the state concedes that unemployment is due someone and simply fails to establish administrative mechanisms that result in paying him within a reasonable time." *Id.*; *see also Fusari*, 419 U.S. at 388 n.15 (stating that this argument "would nullify the congressional intention of requiring prompt administrative provision of unemployment benefits"). If the content of the "when due" clause were so eviscerated, "a state could take all the time in the world to decide that an unemployed person was entitled to compensation, provided that it got the check to him promptly when it did decide." *Jenkins*, 691 F.2d at 1229. As we stated in *Jenkins*, we believe that Congress had larger purposes for the clause in mind.

In the same vein, the Secretary as amicus curiae asserts that *Jenkins* is inapposite because an initial determination of eligibility had already been made in that case, which thus implicated the "when due" clause.[7] The proviso at

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[7] We recognize that in some of the relevant cases the state agency at issue had made an initial determination of eligibility and that payment was therefore "due." *See, e.g.*, *Java*, 402 U.S. at 133 (holding that the "when due" clause was violated by lengthy delay in administrative appeal "after an initial determination of eligibility ha[d] been made"). In *Fusari*, however, the Supreme Court indicated that its decision in *Java* did not turn on the fact that only payments, and not eligibility, were suspended by the effect of the statute at issue in that case. Rather, *Fusari* rejected the conclusion of the district court in its case that, because a claimant who had initially been determined eligible subsequently had been deemed ineligible, payments were no longer "due" under the "when due" clause. The Court stated that "[s]uch a definition of the 'when due' requirement of federal law would leave little vitality to *Java*." *Fusari*, 419 U.S. at 388 n.15.

Although no Supreme Court case has addressed the applicability of the "when due" clause when no initial determination of eligibility has been made, the Third Circuit was presented with such a scenario in *Wilkinson v. Abrams*, 627 F.2d 650 (3d Cir. 1980). In that case, the Secretary of Labor tried to distinguish *Fusari* on the basis that "the claimant had at least received an initial ad-

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issue in *Jenkins*—the "held in abeyance" proviso—expressly stated that "a determination of [a claimant's] benefit rights shall be held in abeyance pending the result of any legal proceedings." *Id.* at 1227. In *Jenkins*, therefore, no initial determination of benefits had been made and no payments were "due" in the sense that IDES urges on us in this case. We nonetheless held that the provision at issue was subject to and, indeed, violated the "when due" clause. Similarly, we now hold that section 237 is subject to the "when due" clause.

Second, IDES argues at length that section 237 functions as a measurement of each claimant's attachment to the work force. IDES submits that this function demonstrates that section 237 is as much an eligibility provision that defines the class of claimants as any of the state's monetary provisions, such as section 500E's qualifying wages requirement. *See supra* note 4. However, IDES has conceded in more than one place that the gap created by section 237's base period, in which a claimant's lag quarter wages are not reported, "is necessary because some time is required for employers to report wages and for the [state agency] to make that information available in the local [unemployment insurance] offices where claims are first taken and adjudicated." App. VII at 67 (Stipulated Facts); *see also* Appellee's Br. at 42 (stating that "[s]ection 237's base period facilitates the State's utilization of wage recording"). In other words, section 237's base period is essentially an administrative method employed to accommodate the time needs of a wage record system. In a world of high-speed information exchange, the lag quarter

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[7] *continued*

ministrative determination of eligibility for unemployment compensation benefits." *Id.* at 661 n.14. The Secretary argued "that where a claimant has never been determined eligible, the 'when due' requirement is inapplicable." *Id.* The court rejected the Secretary's argument, stating that the Secretary's "conclusion would no less nullify the 'vitality' of *Java* than the conclusion of the *Fusari* district court." *Id.*

would not exist; yet an eligibility requirement like the "voluntary leaving" provision would. *See* 820 ILCS 405/601. We therefore hold that section 237 is an administrative provision and, as such, is subject to the timeliness requirements of the "when due" clause.

B. *Whether Section 237 Violates the "When Due" Clause*

The next analytical step is to determine whether section 237 "reasonably insure[s] the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a). To do so, it is necessary to decide whether section 237's base period "strikes a reasonable balance" between the plaintiff class's interest in prompt payment of unemployment insurance benefits and the state's interest in minimizing the costs of eliminating delay and in preventing fraudulent claims. *Jenkins*, 691 F.2d at 1230, 1233.

As a "statutory requirement that embodies notions of timeliness, accuracy, and administrative feasibility," assessing section 237 "inevitably will generate fact-specific applications." *Fusari*, 419 U.S. at 388 n.15. Unfortunately, however, because the district court entered judgment for IDES as a matter of law, it made practically no helpful factual findings from the week-long trial it conducted.[8]

[8] The only findings the district court made that could be said to be factual stemmed from its determination that section 237 does not present an "indefinite delay" to unemployment insurance claimants. Mem. Op. at 15. The court engaged in this determination despite the fact that it had already held as a matter of law that section 237 was an eligibility provision not subject to the "when due" clause. For reasons difficult to discern, the district court treated dicta set forth in *Jenkins* (in the context of discussing a state's obligation to make prompt eligibility determinations) as establishing a legal standard. *Jenkins* stated that "[the claimant] must meet the state's eligibility criteria but if the state delays indefinitely in deciding whether he has met them it defeats the objectives behind requiring prompt payment." *Jenkins*, 691 F.2d at

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Because this court is not the proper forum in which to engage in factual findings, we must remand this case to the district court. In *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 486-87 (1977), the Supreme Court decided to resolve whether a certain Ohio statute conflicted with the "when due" clause even though the district court had not dealt with the issue, much less made any findings of fact. However, the Court did so because the resolution of that issue did not entail any findings of fact. The Court indicated that if findings of fact had been involved, it likely would have remanded the case to the district court. *Id.* We therefore believe that the proper course is to remand this case so that the district court can proceed to determine, on the evidence it has already taken and any new submissions from the parties, whether section 237 insures the greatest promptness in paying unemployment benefits that is administratively feasible, making all factual findings that it deems necessary to the resolution of that issue.[9] The district court's sole task is to determine whether the current Illinois scheme is compatible with the "when due" clause. It is not its responsibility to mandate an alternative. If the district court should determine that the current Illinois scheme does not

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[8] *continued*
1229. The term "indefinitely" only made the point that states are required under the "when due" clause not only to make prompt payment of benefits, but also to make eligibility determinations promptly; it was not a new legal standard for examining eligibility criteria.

[9] We have held as a matter of law that lag periods such as IUIA section 237 are administrative methods and not eligibility provisions, and as such are subject to the strictures of the "when due" clause. We note, however, that with respect to whether a given lag period is acceptable under the Secretary's regulations—specifically, whether it reasonably insures payment of benefits "with the greatest promptness administratively feasible," 29 C.F.R. § 640.3(a)—the Secretary has the authority to issue regulations outlining in more detail what is and is not an acceptable lag period under the regulations.

comply with the "when due" clause—a determination upon which we emphatically express no opinion—it will be the prerogative of Illinois, not the district court, to determine the alternative.

Conclusion

For the foregoing reasons, we reverse the decision of the district court that section 237 is an eligibility provision as a matter of law. We hold that section 237 is an administrative method subject to the strictures of the "when due" clause of the Social Security Act. We therefore remand this case to the district court for factual findings and a determination of the issue of section 237's compliance with the "when due" clause and corresponding regulations.

REVERSED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 31, 1994.

Before

Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

LUELLA PENNINGTON, individually and on behalf of other similarly situated persons,

Plaintiff-Appellant,

No. 92-3725 v.

LOLETA DIDRICKSON*, Director of the Illinois Department of Employment Security,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 6327—Paul E. Plunkett, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed on May 16, 1994 by

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* During the pendency of this case, Loleta Didrickson succeeded Sally Ward as Director of the Illinois Department of Employment Security. Director Didrickson has been substituted for her predecessor pursuant to Federal Rule of Appellate Procedure 43(c)(1).

defendant-appellee, no judge in active service has requested a vote thereon, and all the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

LUELLA PENNINGTON, individually and on behalf of other similarly situated persons,

Plaintiffs,

No. 85 C 6327 vs.

LYNN DOHERTY,

Defendant.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiffs['], Luella Pennington, individually and on behalf of other similarly situated persons, motion for judgment is granted and judgment is entered in plaintiffs['] favor. The defendant, Lynn Doherty, is hereby enjoined permanently from applying section 237 of the Illinois Unemployment Insurance Act to the plaintiff class. The District Court retains jurisdiction over the case to enforce this judgment.

This is a final and appealable order.

February 1, 1996
Date

H. Stuart Cunningham
Clerk

/s/ Theresa B. Kinney
(By) Deputy Clerk

[Dated February 1, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LUELLA PENNINGTON, individually and on behalf of other similarly situated persons, Plaintiffs,	)	
v.	)	No. 85 C 6327 Hon. Paul E. Plunkett
LYNN DOHERTY, Director of the Illinois Department of Employment Security, in her official capacity, Defendant.	)	

MEMORANDUM OPINION AND ORDER

This case is before us on the plaintiffs' motion for judgment. At issue is whether the manner in which the Illinois Unemployment Insurance Act defines "base period" violates the "when due" clause of the Social Security Act, 42 U.S.C. § 503(a)(1).[1] For the reasons set forth below, we conclude that it does. Therefore, we grant the motion and enter judgment in favor of the plaintiffs, and we

[1] The plaintiffs sued under 42 U.S.C. § 1983.

enjoin the defendant permanently from applying section 237 to the plaintiff class.

Findings of Fact

Based upon the evidence presented at trial and on remand, this Court finds as follows:

I. *Illinois' Current System*

1. Plaintiffs are claimants for unemployment insurance benefits under the Illinois Unemployment Insurance Act ("IUIA"), 820 ILCS 405/100 *et seq.*[2] (Am. Final Pretrial Order, at 2.) Their claims for benefits have been either delayed or denied because of the manner in which "base period" is defined in the IUIA. (*See id.*)

2. Defendant Lynn Doherty is the Director of the Illinois Department of Employment Security ("IDES") and is responsible for the administration of all unemployment insurance and employment service programs in Illinois. (*See id.*, Stip. Facts, ¶ B.1.a.) She is sued in her official capacity.[3] (*Id.*, ¶ B.1.b.)

3. IDES is Illinois' state employment security agency ("SESA"). (*Id.*, ¶ B.1.c.) IDES operates through a central office located in Chicago and local offices located throughout the state. (*Id.*, ¶ B.1.d) The local offices accept claims for benefits, process those claims, and initially adjudicate them. (*Id.*)

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[2] Formerly Ill. Rev. Stat. ch. 48, §§ 301 *et seq.*

[3] References to "the defendant" and "IDES" are used interchangeably herein.

4. To be eligible for benefits, a claimant must have been paid wages for insured work during the base period of not less than $1,600, of which at least $440 must have been paid during that part of his base period which does not include the calendar quarter in which the wages paid to him were highest. 820 ILCS 405/500(E). (Am. Final Pretrial Order, Stip. Facts, ¶ A.1.)

5. Section 237 of the IUIA defines "base period" as the first four of the last five completed calendar quarters immediately preceding the claimant's benefit year.[4] 820 ILCS 405/237. (Am. Final Pretrial Order, Stip. Facts, ¶ A.4.)

6. Claimants with sufficient wages in their base period are "monetarily eligible" for benefits. (*Id.*, ¶ A.1.)

7. Whether a claimant is monetarily eligible is resolved by a "finding." 820 ILCS 405/701. (Am. Final Pretrial Order, ¶ A.2.) When a claimant first files for benefits, IDES' staff in the local office accesses the Benefits Information System ("BIS"), a computer-based processing system which stores information regarding the payment of unemployment insurance benefits to claimants, processes payments of benefits to claimants, and reports on benefit payment activity. (*Id.*, ¶ D.1.) When a claim is entered on the BIS, the computer generates a document which indicates the claimant's base period, the wages in each quarter of the base period, and the resultant benefit amount. (*Id.*, ¶ D.2.) The document reflects a "finding." (*Id.*)

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[4] A "benefit year," for initial claims, is the one year period beginning on the first day of the week (i.e., Sunday) in which the individual first files a valid claim for benefits. 820 ILCS 405/242.

8. If a claimant is found to be monetarily eligible, he or she is determined to have filed a "valid claim."[5] 820 ILCS 405/242. (Am. Final Pretrial Order, Stip. Facts, ¶ A.2.)

9. The manner in which "base period" is defined in section 237 prohibits IDES from considering a claimant's wages earned in either the calendar quarter in which his or her claim is filed (the "filing quarter") or the immediately preceding calendar quarter (the "lag quarter"). (*Id.*, ¶ A.5.) Where a claimant filing an initial claim for benefits needs his or her filing quarter or lag quarter wages considered in order to be monetarily eligible, the manner in which "base period" is defined in section 237 results in a determination that the claimant is ineligible for benefits as of the date of the initial claim. (*Id.*, ¶ A.6.)

10. Claimants who do not have sufficient wages in the base period, but who would be monetarily eligible if their lag quarter or filing quarter wages, or both, were considered, may be required to wait up to six months in order to file a valid claim for benefits. (*Id.*, ¶ A.7.)

11. A claimant, determined to be monetarily ineligible on his or her initial claim, may file a second claim if there are sufficient wages in the second claim base period. (*Id.*, ¶ A.8.) Where a claimant's second claim is valid, IDES treats the claimant as ineligible to receive benefits for the weeks between the filing of the initial claim and the second, valid claim. (*Id.*)

12. Plaintiff Luella Pennington ("Pennington") filed an initial claim for benefits on June 7, 1984. (*Id.*, ¶ B.2.b.)

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[5] A claimant with a valid claim may be denied benefits for non-monetary reasons, such as "misconduct" or "voluntary leave." *See, e.g.*, 820 ILCS 405/601, 602. (Am. Final Pretrial Order, Stip. Facts, ¶ A.2, n.4.)

The base period created by that claim consisted of the four calendar quarters in 1983. (*Id.*)

13. Pennington earned no wages for insured work during 1983. (*Id.*, ¶ B.2.c.) Therefore, she was not monetarily eligible for benefits based on her June 7, 1984, claim. (*Id.*)

14. Pennington earned wages for insured work in the first and second quarters of 1984. (*Id.*, ¶ B.2.d.)

15. Pennington filed a second claim for benefits on October 5, 1984. (*Id.*, ¶ B.2.e.) The base period created by her second claim consisted of the last two quarters of 1983 and the first two quarters of 1984. (*Id.*, ¶ B.2.f.) Pennington had sufficient wages in the base period created by her second claim to make her monetarily eligible for benefits. (*Id.*, ¶ B.2.g.) She was paid benefits beginning the week of October 5, 1984. (*Id.*)

16. By order of July 11, 1986, this Court certified a class defined as follows:

> All claimants for unemployment insurance benefits under the Illinois Unemployment Insurance Act ("the Act"), who since July 15, 1983, have been, are being or will be denied such benefits by the Illinois Department of Employment Security solely because part or all of their wages, otherwise sufficient to satisfy Section 500(E) of the Act, were disregarded by operation of Section 237 of the Act.

(*Id.*, ¶ B.3.a.)

II. *Wage Record and Wage Request Systems*

17. States generally use one of two systems, the wage record system and the wage request system, to compile wage data in order to determine whether unemployment

insurance benefits claimants have sufficient wages to qualify for benefits. (*Id.*, ¶ C.1.)

A. *Wage Record Systems Generally*

18. Under a wage record system, those employers covered by the state's unemployment insurance statute report the gross wages of all their employees to the state's SESA on a regular (usually quarterly) basis. (*Id.*)

19. In a wage record system, there is a gap between the end of the claimant's base period and the beginning of the claimant's benefit year. (*Id.*, ¶ C.3.) This gap is necessary because some time is required for employers to report wages and for the SESA to make that information available to the local offices where claims are first taken and adjudicated. (*Id.*)

B. *Illinois' Wage Record System*

20. Illinois uses the wage record system, which is the one most commonly used today. (*Id.*, ¶ C.2.)

21. On a quarterly basis, Illinois employers file reports with IDES of the gross wages paid to their employees. (*Id.*, ¶ D.3.) Employers are required to report wages by the last day of the month following the quarter in which the wages were paid (the "reporting months"), that is, on April 30, July 31, October 31, and January 31. (*Id.*, ¶ D.6.)

22. IDES receives about eighty percent of employers' wage reports in a ten-day period between the last five days before the end of a reporting month and the first five days after the end of a reporting month. (*Id.*, ¶ D.11.)

23. Employers can submit their wage reports on a form called a UC 3/40. (*Id.*, ¶ D.5.) About eighty-five percent

of employers file their UC 3/40's in a timely fashion. (*Id.*, ¶ D.8.)

24. In 1990, it took from one to five weeks before the wage information from the UC 3/40's was put into IDES' computers. (*Id.*, ¶ D.7.) At the end of 1994, with staff and budget constraints, IDES input only 32.5 percent of wage reports by the sixth week of the quarter. (Pl. Ex. 23 at 8.)

25. Approximately three percent of employers in Illinois submit their wage reports on magnetic tape. (Am. Final Pretrial Order, Stip. Facts, ¶ D.12.)

26. After a magnetic tape is received, it takes twelve to thirty-six hours to post the information on the IDES computers. (*Id.*, ¶ D.15.) During peak periods, it can take up to seventy-two hours. (*Id.*)

27. There are four peak periods at IDES resulting from the submission of employers' wage reports. (*Id.*, ¶ D.10.) The peak periods begin about one week prior to the end of the reporting months, and last for about three to eight weeks. (*Id.*) An additional week is needed to process delinquent reports. (*Id.*)

28. Under Illinois' wage record system, there is a gap between the last day of the fourth of the five completed calendar quarters prior to the beginning of the filing quarter (the end of the claimant's base period) and the Sunday of the week in which the claimant files for benefits (the beginning of the claimant's benefit year). (*Id.* ¶ C.3.)

C. *Wage Request Systems Generally*

29. Under a wage request system, wage information for a particular claimant is requested of the claimant's employer when the claimant files a claim. (*Id.*, ¶ C.4.) Thus, wage information is not reported to a SESA except

as required to adjudicate a claim. (*Id.*, ¶ C.5.) As a result, the SESA can request the most recent wage information for the claimant, that is, the claimant's wage information for the year just prior to the filing of the claim. (*Id.*) Wage request systems have either no gap or no substantial gap between the end of the base period and the beginning of the benefit year. (*Id.*)

30. In early 1995, only two states, Michigan and New York, used wage request systems. (Pl. Ex. 21 at 4, n.5.) Michigan is changing to a wage record system, which will be in place in 1997. (*Id.* at 4, n.6.)

III. *"Moveable" or "Alternative" Base Periods*

31. A few states use a "moveable" or "alternative" base period ("ABP") where a claimant needs to have his or her more recent wages considered in order to qualify. (Am. Final Pretrial Order, Stip. Facts, ¶ C.6.) Using an ABP, the SESA first looks at the wages earned in the first four of the last five completed calendar quarters, but if the claimant lacks sufficient wages to qualify, then the SESA redetermines the claim based on the wages earned in the last four completed calendar quarters prior to the date the claim was filed. (*Id.*)

32. In 1990, four states, Minnesota, Ohio, Vermont, and Washington, used ABPs to redetermine monetarily [sic] eligibility if a claimant was found to be ineligible using the traditional base period. (Pl. Ex. 2 at 1.) By 1995, six states, Maine, Massachusetts, Ohio, Rhode Island, Vermont, and Washington, used ABPs to redetermine monetarily [sic] eligibility. (Pl. Ex. 21 at 3.) During 1995, two additional states, Michigan and New Jersey, enacted statutory provisions allowing for use of an ABP where a claimant is

found monetarily ineligible using the standard base period. (Mich. Comp. Laws Ann. § 421.45 (West 1995); N.J. Stat. Ann. § 43:21-19 (West 1995).)

33. Maine and Washington are the only two states using ABPs that were formerly wage record states. (Pl. Ex. 21 at 4.) The remaining states using ABPs were wage request states, and they adopted ABPs as part of the process of changing from wage request to wage record systems. (*Id.*) The ABPs were adopted because some claimants eligible under the wage request systems would be ineligible under the new wage record systems. (*Id.*)

34. Analysis of data from Maine, Massachusetts, Ohio, Rhode Island, Vermont, and Washington indicates that the use of an ABP increases the number of monetarily eligible claimants by six to eight percent. (*Id.* at 2.)

35. In February 1995, the Advisory Council on Unemployment Compensation, in a report to the President and Congress entitled, "Unemployment Insurance in the United States: Benefits, Financing, Coverage," recommended that all states "use a moveable base period in cases in which its use would qualify an Unemployment Insurance claimant to meet the state's monetary eligibility requirements." (Pl. Ex. 20 at 17.) The Advisory Council found that "advances in technology have made it feasible for all states to use the most recently completed quarter [i.e., the lag quarter] when determining benefit eligibility, and that using this quarter is consistent with the legislative requirement that states ensure full payment of Unemployment Insurance when due." (*Id.* at 16.)

V. [sic] *The Adoption of an APB* [sic] *in Illinois*

A. *Plaintiffs' Proposals for an ABP*

i. *Alternative I*

36. To implement an ABP system in Illinois, plaintiffs have proposed two alternatives.[6] (*See* Pl. Ex. 18.) Under Alternative I, if a claimant was monetarily ineligible using the standard base period, IDES would reconsider the claim using the last four completed calendar quarters. (*Id.* at 1.) If the claimant's wage information for the most recent quarter was not yet available on the IDES computer system, IDES would determine whether the claimant had earned at least $440 in the last three quarters of the standard base period (the "threshold test"). (*Id.* at 2.) If the claimant did not have sufficient earnings, IDES could immediately determine that the claimant could not qualify even if lag quarter wages were considered. (*Id.*) If the claimant passed the threshold test but his or her lag quarter wage information was not yet available, IDES would hold the claim until the wage information became available and then reconsider it. (*Id.*) If the claimant was then found to be eligible based on the lag quarter wages, IDES would pay benefits retroactive to the date the claim was filed. (*Id.*)

37. Under Alternative I, if the claimant's fourth quarter wages were not available, the length of time which the claimant would have to wait for IDES to redetermine his or her claim would depend upon how early in the filing quarter the claimant filed his or her claim. (*See id.*) Where the claim was filed during the first four

[6] The plaintiffs proposed a third alternative, the adoption of a wage request system, but they have acknowledged that its administrative costs would be significantly higher than for the other two alternatives while providing only marginally increased benefits. (Pl. Ex. 18 at 3-4.) As a result, they have not argued for the adoption of Alternative III.

to eight weeks of the filing quarter, it is likely IDES would either not have received or not have completed processing the employer's quarterly wage report. (*See id.*) As a result, a claimant filing early would have to wait longer for IDES to reconsider his or her claim using the ABP than a claimant filing late in the quarter. (*Id.*) However, lag quarter eligible claimants would still wait less time for benefits than under the present system. (*Id.*)

ii. *Alternative II*

38. Under Alternative II, if a claimant who filed in the first month of the quarter passed the threshold test but his or her fourth quarter wage information was not yet available, IDES would send a wage request to the claimant's employer. (*Id.*) Most wage requests would be returned within about three weeks. (*Id.* at 3.) Thus, under Alternative II, claimants filing in the first month of the quarter who require use of the ABP to be monetarily eligible would wait less time for benefits than under Alternative I. (*Id.*)

39. Alternative II requires more IDES staff and, therefore, it would be more costly to implement. (*See id.*) However, it would provide only marginally greater benefits to the plaintiffs. (*See* Tr. 89.)[7]

40. If IDES implements an ABP, it intends to include a "reachback" system in order to identify an undetermined number of members of the plaintiff class and pay them benefits they were denied under the present system, even though neither Alternative I nor II require it. (Def. Ex. 24 at 7.) IDES believes a reachback system is neces-

[7] "Tr." refers to the trial transcript, submitted as Def. Ex. 12.

sary because it cannot be certain that any new system would be in place in a timely manner, and thus it would have to pay retroactiv benefits for the period from the date the new system should have been operational to the date the new system is actually operational. (Def. Br. at 28-29.)

41. If IDES implements an ABP, a claimant's filing quarter wages will not be considered. (*See* Def. Ex. 24 at 4-5; *see also* Tr. 29.)

B. *The Benefits of an ABP to the Plaintiff Class*

42. The adoption of an ABP in Illinois will both speed payment of benefits to those claimants whose benefits are delayed under the present system and result in the payment of benefits (or more weeks of benefits) for some claimants who receive no benefits (or fewer weeks of benefits) under the present system. (Am. Final Pretrial Order, Stip. Facts, ¶ A.9.)

43. In 1986, IDES received 526,469 claims for unemployment insurance benefits. (*Id.*, ¶ B.3.c.) Of those, approximately 15,034 claims (of among 63,518 claims which were denied because the claimant lacked qualifying wages) would have been monetarily eligible if the wages earned in the lag quarter had been considered ("lag quarter eligible claimants"). (*Id.*). Of the lag quarter eligible claimants, about 9,500 filed a second claim for benefits. (Def. Ex. 7 at 3; Tr. 45). Approximately 8,997 of them had sufficient qualifying wages on their second claim; 701 were disqualified for other reasons. (Def. Ex. 6.) The remaining 5,592 did not file a second claim. (*Id.*)

44. Approximately 8,296 lag quarter eligible claimants received some benefits by filing a second claim, although some of them returned to work before receiving all the

benefits they would have if their first claim had been valid. (*Id.*) Using an ABP, these claimants would have received their benefits an average of forty-five days sooner than they did under the present system. (Tr. 70.)

45. In 1986, between about 13,800 and 15,034 lag quarter eligible claimants would have received about $8,500,000 in additional benefits if an ABP had been used. (Def. Ex. 2 at 2; Def. Ex. 6; Def. Ex. 7 at 1; Tr. 493, 506, 521.)

46. Of the claims filed in 1986, approximately 9,115 claims would have been monetarily eligible if the wages earned in the filing quarter had been considered ("filing quarter eligible claimants").[8] (Am. Final Pretrial Order, Stip. Facts, ¶ B.3.c.) Under an ABP system which considers lag quarter wages, filing quarter eligible claimants could file a valid claim three months sooner than they can under the present system. (Tr. 30, 70-71, 509.)

47. From October 1, 1992, to September 30, 1993, IDES received 100,744 ineligible claims, of which 22,057 were potentially eligible under an ABP. (Pl. Ex. 23 at 22.)

48. In 1994, the defendant, in a letter sent to SESA administrators in other states, estimated that use of an ABP in Illinois would increase the amount of benefits paid by the IDES by $30,000,000 to $40,000,000 annually.[9] (Pl. Ex. 22 at 2.)

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[8] Neither of the plaintiffs' proposals includes consideration of filing quarter wages in determining monetary eligibility. *See supra*, ¶ 42.

[9] This is the highest estimate provided by either side of the increased dollar amount of benefits to the plaintiff class using an ABP. IDES also estimated that use of an ABP in 1986 would have resulted in additional benefits paid out of just over $8,500,000. *See supra*, ¶ 46.

49. Analysis of data from the states using ABP's in 1995 indicates that benefits payouts have increased by approximately four to six percent. (Pl. Ex. 21 at 2.)

50. From 1980 to 1987, IDES averaged total benefits payments of $1,147,768,000. (Def. Ex. 2 at 1.)

C. *The Cost of an ABP to IDES*

51. Implementing either Alternative I or Alternative II would require complex changes to IDES' computer system. (Tr. 272.)

52. According to a 1994 study commissioned by the IDES, the cost of making the required changes to IDES' computer system to implement at ABP would range from $9,400,755 to $10,724,805 if all the work were done by outside vendors. (Pl. Ex. 24 at 8.) If IDES staff performed thirty percent of the work, the cost of an outside vendor would be reduced by $1,851,419. (*Id.* at 8-9.)

53. In 1990, IDES estimated that, to implement Alternative I, it would incur conversion costs of approximately $2,000,000. (Tr. 587.) In 1995, IDES estimated that implementing Alternative I would cost $5,863,347. (Pl. Ex. 26 at 4.)

54. In 1994, the defendant, in her letter to SESA administrators in other states, estimated that the cost to the IDES of adopting an ABP would be $2,000,000 in computer conversion costs and $200,000 to $300,000 per year in personnel costs. (Pl. Ex. 22 at 2.)

55. In 1990, IDES estimated that, to implement Alternative II, it would incur conversion costs of about $2,500,000. (Tr. 289.) In January 1995, in a study commissioned by IDES, it was estimated that implementing Alternative II would also cost between $8,400,000 and $9,300,000 in one-

time computer costs, and $80,000 per year in computer operating costs. (Pl. Ex. 24 at 9.) In late 1994, IDES estimated that one-time staff costs to implement Alternative II would be $4,047,357, and on-going annual staff costs would be $2,571,158. (Def. Ex. 24, Atts. B "Cost Calculations" and C "Cost Calculations.")

56. Based upon the additional staff required by the State of Washington to administer a system similar to Alternative I which was in use prior to 1993, IDES would require approximately fifty to sixty additional staff to administer Alternative I at a cost of at least $2,000,000 to $2,400,000 per year. (Tr. 570.)

57. It would take IDES approximately fifteen months to implement either Alternative I or Alternative II. (Tr. 289.)

58. Because IDES lacks sufficient staff to implement either Alternative I or Alternative II, consultants would have to be hired. (Tr. 288.)

59. IDES would have to re-train approximately two-thirds of its employees to operate the new system. (Tr. 283).

60. The federal government has, in the past, failed to fully fund IDES, although section 302(a) of the Social Security Act, 42 U.S.C. § 502(a), requires it to fund all administrative costs for state unemployment insurance programs. (Tr. 475.) From 1984 to 1990, there was a drop of about twenty-five percent in terms of "real" dollars funding for IDES. (*Id.*) Thus, if IDES implements an ABP, the State of Illinois is likely to bear the cost. (Tr. 490.)

61. Under state law, before IDES can incur the expenditures required to implement an ABP, a source of revenue must be identified first. (Tr. 487.) IDES is currently experiencing severe budget constraints, and funding to im-

plement an ABP would require cuts in IDES' current budget. (*Id.*)

62. IDES' staff has already decreased from approximately 3,000 in 1990 to just over 2,100 in late 1994. (Def. Ex. 23 at 2.)

VI. [sic] *Problems with an APB* [sic]

63. No state uses a "threshold test" as proposed in plaintiffs' Alternative I because all states require their SESAs to accept every claim filed. (Tr. 676.)

64. The Department of Labor requires SESAs to make eighty-seven percent of first payments within a minimum of either fourteen or twenty-one days of the end of the first compensable week, depending upon the state's system. (20 C.F.R. § 640.5; *see also* Pl. Ex. 25 at 8.)

65. Where a state uses only a standard base period system, the Department of Labor, in determining whether the state is paying unemployment insurance benefits "when due," does not count the twelve weeks of the lag quarter. (*See* Tr. 245.) Rather, it counts only the number of weeks in the filing quarter from the date the claim is filed until the date the first benefits payment is issued. (*Id.*) The Department of Labor ignores the lag quarter in determining timeliness because it considers the definition of base period an "eligibility requirement."[10] (*See* Def. Ex. 22.)

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[10] The Department of Labor's interpretation of section 237 and other states' standard base periods as "eligibility requirements" was rejected by the Seventh Circuit in this case. *Pennington v. Didrickson*, 22 F.3d 1376, 1386 (7th Cir. 1994). The Seventh Cir-

(Footnote continued on following page)

66. Where a state uses an ABP, the Department of Labor, in determining whether the state is paying unemployment insurance benefits "when due," counts all weeks from the date the claim is filed until the date the first benefits payment is issued. (*See* 20 C.F.R. § 640.5.)

67. Prior to 1993, the State of Washington used a system similar to Alternative I, in that, where a claimant's wages from the last completed quarter were not yet available, it would defer a decision on a claim until that information became available. (Pl. Ex. 21 at 28-29.) The Department of Labor informed Washington in 1992 that it was in violation of the "when due" clause. (*See id.* at 23, n.29.)

68. As a result, Washington changed its system for claims filed in the first month of the quarter. (*Id.* at 29.) For such claims, the claims office contacts the agency's local tax office to obtain missing wage information directly from employers and enter it into the quarterly wage reporting system. (*Id.*) Claims filed during the second and third months of the quarter are processed as before 1993. (*Id.*) For claims filed during the second and third months of the quarter, Washington gives priority in keypunching to ABP claims. (*Id.*) Using the employer's federal identification number and the claimant's Social Security number, the relevant hard copy quarterly wage report is lo-

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[10] *continued*
cuit held that section 237 is an administrative method, not an eligibility requirement. *Id.* at 1387.

On this basis, the plaintiffs have argued that IDES does not need to adopt the more expensive Alternative II with its wage request provision, because the Department of Labor's determination of timeliness is not the law in this circuit. However, we do not reach the issue of which alternative IDES must adopt. *Id.* at 1388.

cated, and the information pertaining to the claimant is keypunched immediately. (*Id.* at 29-30.) This system entails added administrative costs. (*Id.* at 30.)

69. The implementation of Alternative I is likely to affect IDES' timeliness in making first payments because a majority of claimants with ABP claims would have to wait six to ten weeks for their lag quarter wages to be posted. (Pl. Ex. 25 at 5.) As a result, the Department of Labor would likely find IDES in violation of the "when due" clause under that system. (Tr. 594; *see also* Pl. Ex. 21 at 32, n.44.)

Discussion

Section 303(a)(1) of the Social Security Act requires a state unemployment insurance program to provide for "methods of administration . . . reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1). Under section 303(a)(1), the "when due" clause, a state must provide for such "methods of administration as will reasonably insure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a).

In this case, the Seventh Circuit has determined that the base period defined in section 237 is not an eligibility requirement, but rather is an administrative provision subject to the timeliness requirement of the "when due" clause. *Pennington v. Didrickson*, 22 F.3d 1376, 1387 (7th Cir. 1994).[11] Consequently, we must determine "whether

[11] The Seventh Circuit reversed our decision that section 237 is an eligibility requirement and remanded for a determination of whether it violates the "when due" clause. *Id.* at 1387-88.

section 237 insures the greatest promptness in paying unemployment benefits that is administratively feasible." *Id.* at 1388. "To do so, it is necessary to decide whether section 237's base period 'strikes a reasonable balance' between the plaintiff class's interest in prompt payment of unemployment insurance benefits and the state's interest in minimizing the costs of eliminating delay and in preventing fraudulent claims." *Id.* at 1387 (quoting *Jenkins v. Bowling*, 691 F.2d 1225, 1230 (7th Cir. 1982)).

Both sides in this case have taken the position, at least implicitly, that the reasonable balance we are to strike involves weighing the additional benefits, both in dollars of benefits paid out and in numbers of persons eligible, which the plaintiffs would receive under an alternative system on the one hand against the cost to IDES of implementing and operating such a system on the other. Similarly, in *Jenkins v. Bowling*, 691 F.2d 1225 (7th Cir. 1982), the Seventh Circuit weighed the limited evidence of the additional benefits to claimants and the costs to IDES in invalidating section 602B of the IUIA. *Id.* at 1233. Hence, we think the parties' analysis is appropriate here, albeit with one addition: the increased promptness with which eligible claimants would receive benefits under an ABP. While, in this case, the Seventh Circuit also identified the prevention of fraudulent claims as a factor to be weighed in favor of IDES, *Pennington*, 22 F.3d at 1387, on remand, IDES has not argued that the adoption of an ABP would necessarily lead to an increase in fraudulent claims. Rather, it has asserted only that certain methods of implementing an ABP, such as wage affidavits executed by claimants, carry with them the possibility of increased fraudulent claims. Consequently, the prevention of fraudulent claims does not play a significant role in our analysis.

Thus, we weigh four factors to determine if section 237 strikes a reasonable balance. Three of them, namely, the number of additional eligible claimants, the amount in dollars of additional benefits paid out, and the increased promptness with which eligible claimants would receive benefits, inure to the benefit of the plaintiffs. The fourth, the cost to IDES to implement an ABP, weighs in favor of the defendant.

First, we consider the number of additional claimants who would be eligible under an ABP system. The parties stipulated that the adoption of an ABP in Illinois will result in the payment of benefits (or more weeks of benefits) for some claimants who receive no benefits (or fewer weeks of benefits) under the present system. *See supra*, ¶ 42. The evidence indicates that anywhere from 13,800 to 40,000 members of the plaintiff class would be eligible for benefits if an ABP which considered lag quarter wages were adopted. The lowest estimate of 13,800 additional eligible claimants is based upon IDES' estimate of the number of lag quarter eligible claimants in 1986; it represents an increase of 4.6 percent in the total number of eligible claimants for that year. *See supra*, ¶ 45. IDES also presented evidence estimating the number of additional eligible claimants at 22,000 for the period of October 1992 to September 1993. *See supra*, ¶ 47. The highest estimate of 40,000 additional claimants is an eight percent increase in the total number of eligible claimants in 1986; it is based upon analysis of data from the six states using ABP's, which suggests an increase of six to eight percent in the number of eligible claimants. *See supra*, ¶ 34. We find that even the lowest estimate of 13,800 additional eligible claimants represents a significant increase in the number of claimants who would receive benefits under an ABP. *See Jenkins v. Bowling*, 691 F.2d 1225,

1232 (7th Cir. 1982) (in 1979, fewer than 400 people adversely affected by section 602B of IUIA).

Next, we consider the amount in dollars of additional benefits IDES would pay out using an ABP. IDES estimated that, in 1986, it would have paid out an additional $8,500,000 in benefits if an ABP had been used. *See supra*, ¶ 45. However, in 1994, it estimated that an additional $30,000,000 to $40,000,000 per year in benefits would be paid out using an ABP. *See supra*, ¶ 48. And, analysis of data from the states using ABP's in 1995 indicates that benefits payouts have increased by approximately four to six percent. *See supra*, ¶ 49. From 1980 to 1987, IDES averaged total benefits payments of $1,147,768,000. *See supra*, ¶ 50. Four percent of this amount is approximately $40,000,000.

We find IDES' estimate of increased benefits paid out of $30,000,00 to $40,000,000 most credible, both because it is more recent than the 1986 estimate and because it is corroborated by analysis of data from the six states currently using ABP's. This is a *dramatic* increase in financial benefits to unemployed persons. As the Seventh Circuit noted in *Jenkins*, "One of the original purposes of the federal unemployment insurance program was to reduce the severity of the business cycle by maintaining the purchasing power of people laid off during a recession." *Id.* at 1232. It is beyond argument that an additional $30,000,000 to $40,000,000 in benefits would significantly affect the purchasing power of unemployed persons and thus would further this goal of the unemployment insurance program.

We consider now the increased promptness with which claimants would receive benefits under an ABP. The parties stipulated that the adoption of an ABP in Illinois will

speed payment of benefits to those claimants whose benefits are delayed under the present system. *See supra*, ¶ 42. Moreover, an ABP results in prompter payment of benefits to both lag quarter eligible and filing quarter eligible claimants. In the most extreme cases, such claimants will be eligible for benefits twelve weeks earlier than under section 237.[12] *See supra*, ¶ 46.

Finally, we consider the cost to IDES if it were to adopt an ABP. For this analysis, we have used only IDES' cost estimates, which are significantly higher than the plaintiffs'. We have done so for two reasons. First, although IDES' cost estimates may well be inflated, we find them more thorough and credible than the plaintiffs' estimates. The methodologies used by IDES, whether by its own staff or its expert, Michael Marshman, are more reliable and, we think, reflect with greater accuracy the complexity of converting IDES' current computer system to implement an ABP than the methodology used by the plaintiffs' expert, Peter Kauffman. We have also used IDES' estimates because using the highest cost estimates should demonstrate most clearly whether the costs outweigh the benefits to the plaintiffs.

IDES has estimated that it would incur one-time costs of nearly $13,500,000 for both computer conversion and additional staff and annual costs of almost $2,600,000 to implement an ABP. The one-time cost estimate is based upon IDES' estimate, in January 1995, that it would incur

[12] For some ABP-eligible claimants, such as those who return to work before receiving the maximum benefits available under the current system, prompter payment of benefits means additional dollars of benefits received, so the estimates of the total additional dollar amount of benefits to the plaintiff class include some benefits received as the result of prompter payment.

up to $9,300,000 in one-time computer conversion costs and its estimate, in late 1994, that it would incur one-time staff costs of $4,047,357, if it adopted plaintiffs' Alternative II. *See supra*, ¶ 55. The on-going cost estimate is based upon IDES' estimate, in January 1995, that it would incur $80,000 annually in computer operating costs and its estimate, in late 1994, that it would incur $2,571,158 annually in staff costs, to adopt Alternative II. *Id.* Moreover, IDES already operates under budgetary constraints and implementing an ABP system will impose even greater obligations on an already over-burdened agency. *See supra*, ¶ 61.

In sum, the evidence shows that between 14,000 and 40,000 members of the plaintiff class would likely receive an additional $30,000,000 to $40,000,000 per year in benefits and would receive their benefits sooner if an ABP were used, at a one-time cost of nearly $13,500,000 and an annual cost of almost $2,600,000 to IDES. The use of an ABP would significantly increase the number of claimants who would receive benefits, the speed with which benefits are paid, and the dollar amount of benefits paid. While the costs to IDES are undeniably significant as well, they are not so onerous as to outweigh the benefits to the plaintiffs. Given this, the benefits to the plaintiffs clearly outweigh the costs to IDES.

On this basis, we conclude that section 237 violates the "when due" clause because it does not insure the greatest promptness in paying unemployment insurance benefits that is administratively feasible. IDES may not continue to use its current system simply to avoid the administrative costs it would incur by adopting an ABP. While, conceivably, increased administrative costs could be so great that they might demonstrate that an alternative system would not be administratively feasible, even the highest

cost estimates in this case do not support that conclusion here. Moreover, while we believe the exclusion of lag quarter wages was administratively necessary at one time because SESAs needed the lag quarter to compile employer wage report information, we are persuaded by the observation of the Advisory Council on Unemployment Compensation that "advances in technology have made it feasible for all states to use the most recently completed quarter [i.e., the lag quarter] when determining benefit eligibility." *See supra*, ¶ 35. At the present time, section 237 does not strike a reasonable balance between the plaintiffs' interest in prompt payment of benefits and IDES' interest in minimizing the costs of eliminating delay and in preventing fraudulent claims. Therefore, we hold that section 237 violates the "when due" clause.

Finally, the plaintiffs have requested that we order the defendant to submit an alternative to section 237 to us with reasonable promptness. However, as the Seventh Circuit made clear,

> The district court's sole task is to determine whether the current Illinois scheme is compatible with the 'when due' clause. It is not its responsibility to mandate an alternative. . . . It will be the prerogative of Illinois, not the district court, to determine the alternative.

Pennington, 22 F.3d at 1388. In our view, requiring the defendant to submit an alternative to this Court implies that we have the authority either to approve or reject it. We do not believe that we may properly exercise that degree of control over the defendant's efforts. Consequently, the relief we grant is limited to enjoining the defendant permanently from applying section 237 to the plaintiff class. This does not render this judgment enforceable [sic], however. We do retain jurisdiction so that, if the

plaintiffs believe that the method adopted by the defendant is inconsistent with this opinion, which could include a failure by the defendant to adopt an alternative within a reasonable time, they may request supplemental relief from this Court. *See Jenkins*, 691 F.2d at 1234.

Conclusion

For the forgoing reasons, we hold that section 237 of the Illinois Unemployment Insurance Act violates the "when due" clause of the Social Security Act. We grant the plaintiffs' motion for judgment and enter judgment in their favor. The defendant is hereby enjoined permanently from applying section 237 to the plaintiff class. This Court retains jurisdiction over this case to enforce this judgment. This order is final and appealable.

ENTER:

/s/ Honorable Paul E. Plunkett
UNITED STATES DISTRICT JUDGE

DATED: February 1, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

LUELLA PENNINGTON, individually and on behalf of all others similarly situated,

Plaintiff,

v.

Case Number: 85 C 6327

SALLY WARD, in her official capacity as Director of the Illinois Department of Employment Security,

Defendant.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Defendant Sally Ward, Director of the Illinois Department of Employment Security, and against Plaintiff Luella Pennington, individually and as representative of a class of persons similarly situated, as to all claims.

Date October 21, 1992

H. STUART CUNNINGHAM
Clerk

/s/ Theresa B. Kinney
(By) Deputy Clerk

[Dated October 21, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LUELLA PENNINGTON, individually and on behalf of all others similarly situated,

Plaintiff,

v.

SALLY WARD, in her official capacity as Director of the Illinois Department of Employment Security,

Defendant.

No. 85 C 6327 — Hon. Paul E. Plunkett

MEMORANDUM OPINION AND ORDER

Luella Pennington, individually and on behalf of a class of applicants for Illinois unemployment insurance benefits, challenges the constitutionality of section 237 of the Illinois Unemployment Compensation Act ("IUCA"), Ill. Rev. Stat. ch. 48, ¶ 347 (1986). In that section, Illinois defines the "base period" used to determine whether a claimant is eligible for benefits as earnings during the "first four of the last five quarters."[1] This definition excludes from

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[1] Paragraph 347 states, in pertinent part, "For each benefit year beginning on or after November 1, 1981, 'base period' means the first four of the last five completed calendar quarters immediately preceding the benefit year." Ill. Rev. Stat. ch. 48, ¶ 347 (1986). "Calendar quarter" is defined as "the period of three consecutive calendar months ending on March 31, June 30, September 30, or December 31, or the equivalent thereof as the Director may by regulation prescribe." Ill. Rev. Stat. ch. 48, ¶ 348 (1986).

consideration earnings from the quarter immediately preceding the application. In Ms. Pennington's case, she could not meet the earnings levels required by the IUCA unless her earnings in the last quarter preceding her application were considered. Consequently, Ms. Pennington's application was denied, and she was required to wait an additional quarter and then to reapply. Upon re-application, Ms. Pennington was found eligible and was paid her unemployment benefits.

Ms. Pennington claims that Illinois, by using a base period of the first four of the last five quarters, violates a federal mandate requiring promptness in both eligibility determinations and benefits payments. Ms. Pennington asks for herself and others adversely affected that the Illinois base period be found unconstitutional under the Supremacy Clause of the United States Constitution.[2]

This Court held a week-long trial on the issue, and this Opinion will incorporate factual findings from that trial where appropriate.

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[2] The Supreme Court recently discussed the Supremacy Clause analysis in *Cipollone v. Liggett Group, Inc.*, ____ U.S. ____, 112 S. Ct. 2608 (1992):

> Article VI of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. Thus, since our decision in *M'Cullough v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819), it has been settled that state law that conflicts with federal law is "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

112 S. Ct. at 2617.

The Social Security Act

As Judge Posner explained in *Jenkins v. Bowling*, 691 F.2d 1225 (7th Cir. 1982), the federal government, which partially funds the state unemployment compensation system, has "attached some strings to its largesse." *Id.* at 1226. Under section 303(a)(1) of the Social Security Act, the Secretary of Labor is required to make certain that a state's unemployment insurance law has methods of administration "reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1) (1988). The regulations issued by the Secretary require "prompt determination of eligibility" and administrative methods that "will reasonably insure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible" and that are "reasonably calculated to insure full payment of unemployment compensation when due." 20 C.F.R. §§ 640.1(1)(2), 640.3(a), 650.1(b). Thus, the federal government, in return for footing part of the bill, requires the state to (a) determine eligibility promptly, and (b) pay full benefits promptly after that determination—as a mandate roughly akin to the notion of all deliberate speed.

Conversely, the Social Security Act and its regulations do not dictate or attempt to control the state's eligibility requirements. *Ohio Bureau of Employment Sec. v. Hodory*, 431 U.S. 471, 486-87 (1977). In *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 523 (1979), the Supreme Court noted, "[T]he voluminous history of the Social Security Act [makes] it abundantly clear that Congress intended the several states to have broad freedom in setting up the types of unemployment compensation that they wish." Consequently, a state has the exclusive and unfettered right to determine who receives benefits and how much those benefits will be without interference

from the federal government. The state must only make its eligibility determination and its benefit payments promptly.

The Illinois Unemployment Compensation Scheme

Illinois has developed a statutory scheme to determine eligibility for benefits which rests on two pillars—wage reporting and a certain minimum amount of earnings during a "base period." A similar scheme is utilized by approximately forty other states. According to the facts undisputed by the parties, under Illinois' wage reporting system, each employer within the state is required to report the wages paid to employees in each calendar quarter. That report must be filed within thirty days of the end of each quarter.[3] The employer's report is then incorporated into Illinois' computer system—a process which takes approximately two weeks. Thus, assuming a timely filing by the employer and normal administrative action by the state, an employee's earnings for any particular quarter are available to the Illinois unemployment offices six weeks after the end of that quarter. The earnings information is the basis from which the state is able to verify an applicant's eligibility for benefits.

To be monetarily eligible for unemployment benefits in Illinois, a claimant must have earned a minimum of $1,600 during the first four calendar quarters of the base period. Ill. Rev. Stat. ch. 48, ¶¶ 347, 420(E) (1986). The total of $1,600 must come from earnings in at least two of those

[3] Considering that some employers may be a few days late and that a few days may be needed for mail delivery as well, in some cases Illinois may not be in possession of the reports for approximately forty days.

four quarters and at least $440 must have been earned in a quarter other than the quarter with the greatest earnings. *Id.* For example, $440 in one quarter and $1,160 in another would meet the minimum eligibility requirements.

However, Illinois, in determining whether the claimant has the minimum earnings, has a base period of the "*first four of the last five quarters*" which precede the filing of the claim. Ill. Rev. Stat. ch. 48, ¶ 347 (1986). This is the provision which Ms. Pennington's class challenges. Under this scheme, an applicant who files in the sixth quarter is not entitled to have earnings from the fifth quarter counted in the determination of his or her monetary eligibility. The fifth quarter is referred to as the "lag quarter." Schematically, then, the base period looks like this:

Base Period

1st Quarter	—	earnings considered
2nd Quarter	—	earnings considered
3rd Quarter	—	earnings considered
4th Quarter	—	earnings considered
5th Quarter	—	lag quarter (earnings not considered)
6th Quarter	—	claim filed

Thus, if a claimant had earned nothing in the first two quarters, $440 in the third quarter and $1,160 in the fourth quarter, he would be eligible if he applied for benefits in the sixth quarter. Similarly, if a claimant had earned $440 in the third quarter, $1,160 in the fourth and a significant amount in the fifth, he would still be eligible. However, if the claimant had earned nothing in the first, second, and third quarters, $600 in the fourth, and $2,000 in the fifth quarter, he would be ineligible if he applied

in the sixth quarter. He would remain ineligible until he refiled in the next (or seventh) quarter, when the sixth quarter would become the "lag quarter" as follows:

	Base Period
1st Quarter[4]	— $0
2nd Quarter	— $0
3rd Quarter	— $0
4th Quarter	— $600
5th Quarter	— $2,000
6th Quarter	— lag quarter (ineligible for benefits)
7th Quarter	— claim filed

Approximately three percent of the claimants for unemployment benefits in Illinois are ineligible for benefits using the first four of the last five quarters but would be eligible if earnings from the fifth quarter (the "lag quarter" immediately preceding the filing of their claim) were counted.[5] The plaintiff class claims that the Illinois base period, by excluding earnings from the "lag quarter," requires many claimants to wait an unreasonable period of time before

[4] Under Illinois' definition of base period, of course, this first quarter would not be counted, as it is not one of the last five quarters before the benefit year. *See* Ill. Rev. Stat. ch. 48, ¶ 347 (1986).

[5] At trial, we considered the claims in 1985. The evidence presented showed that in that year, out of some 195,000 claims for unemployment compensation, approximately 15,000 were by individuals who needed their earnings from the immediately preceding quarter to be eligible for benefits. All were found ineligible at the time of their initial application. Some 8,000 reapplied in the following quarter and obtained benefits.

obtaining benefits for which they were actually eligible at the time of their initial application.

Under the Illinois scheme, the length of the delay an applicant experiences in receiving benefits depends upon when his or her claim is filed. If the claim is made early in the sixth quarter, the delay might be a full ninety days. If the claim is made at the end of the sixth quarter, the delay might be less than a week. From the evidence adduced at trial, it appears that the average delay is approximately six weeks.

Part of the delay is inevitable under Illinois' wage-reporting system because of the administrative time the state needs to compile and process the necessary information. If the fifth quarter earnings are needed to determine eligibility, the state must wait for the employers' reports, which are not due until thirty days after the quarter ends. Further, the state requires two additional weeks after receipt of the reports to process them into the state-wide computer system. Viewed in this light, a minimum time period in the sixth quarter of approximately forty-five days (or about six weeks) is required for Illinois to verify eligibility even if fifth quarter earnings are counted.

Thus, earnings for members of the plaintiff class who file in the second half of the sixth quarter would be reported and available on the state's computer system at the time the class members initially applied for benefits. Thus, the state should require minimal additional administrative time to process their claims. Nevertheless, these applicants (as well those who applied earlier in the quarter) are all required to wait and reapply at the beginning of the seventh quarter. As developed at trial, claimants who need the earnings from the lag quarter in order to meeting the required earnings levels experience an average

delay of four weeks before they become eligible for benefits.[6] Ms. Pennington claims this delay violates the Social Security Act's requirements of prompt determination of eligibility and payment of benefits.

Eligibility Requirement or Unreasonable Delay?

Defendant Sally Ward, Director of the Illinois Department of Employment Security, argues that the so-called "delay" in determining eligibility and receipt of payment is no such thing. Rather, in the state's view, Ms. Pennington and claimants similarly situated are simply ineligible when they apply during the sixth quarter. Thus, there is no delay in "determining eligibility," which is what § 303(a)(1) prohibits. There is also no delay in paying benefits when due because benefits do not become due until the claimant files a new application in the next quarter. Put another way, the Director contends that the Illinois base period is a legitimate eligibility requirement which defines the earnings considered in determining whether benefits are due. States are free to create their own unemployment compensation plans and to define their own eligibility requirements. *Ohio Bureau of Employment Serv. v. Hodory*, 431 U.S. 471, 486-87 (1977); *Jenkins v. Bowling*, 691 F.2d 1225, 1229 (7th Cir. 1982). According to Ms. Ward, Illinois has chosen to use the first four the last five quarters as its base period to determine eligibility. Since this is an eligibility requirement (just like the $1,600 in wages), the state is free to use any yardstick it wishes.

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[6] We conclude that the average delay is four weeks based on the proposition that one-half of the claimants would apply on the fiftieth day of the sixth quarter. The remaining half would apply over the next forty days of the quarter.

Ms. Pennington disagrees. She maintains that the base period is not an eligibility requirement at all. Instead, she argues that eligibility turns on earnings of $1,600 in a span of four quarters, at least $440 of which must have been earned in a quarter other than the quarter with the greatest earnings. Thus, a base period which does not permit a claimant to count earnings from the final quarter preceding his claim is simply a method of delaying the determination of eligibility. Ms. Pennington points out that at the time of her claim for benefits, she had done everything else necessary to receive benefits. She had earned the statutorily required amount, but because part of it came in the "lag quarter," she was required to wait approximately forty-five days and then to reapply for benefits. In essence, she argues, the base period which pretends to define eligibility in reality acts to delay the eligibility determination. Consequently, Ms. Pennington argues, Illinois' base period is a "wolf in sheep's clothing."

To resolve this issue, we must determine whether the Illinois base period, with its lag quarter, is a true eligibility requirement. If so, the Director must prevail, because Congress has left eligibility requirements to the sound discretion of the states. In *Ohio Bureau of Employment Security v. Hodory*, 431 U.S. 471, 486-87 (1977), the Supreme Court concluded that "[n]othing in *Java*[7] purported to define the class of persons eligible for benefits. The Court's sole concern there was with the treatment of those who had already been determined under state law to be eligible." And in *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 523 (1979), the Supreme Court found that, "Congress intended the several

[7] *California Dep't of Human Resources Dev. v. Java*, 402 U.S. 121 (1971).

states to have broad freedom in setting up the types of unemployment compensation that they wish." Our own circuit in *Jenkins v. Bowling*, 691 F.2d 1225 (7th Cir. 1982), has recognized that the claimant must meet the state's eligibility criteria. *Id.* at 1229.

Illinois has established several eligibility requirements. The claimant must have earned a minimum of $1,600 during the first four of the last five quarters preceding his application for benefits. Ill. Rev. Stat. ch. 48, ¶¶ 347, 420(E) (1986). At least $440 of the $1,600 must have been earned in a quarter other than the quarter with the largest amount of earnings. *Id.* These requirements, among others, establish who is eligible to receive benefits.[8] *See, e.g.*, Ill. Rev. Stat. ch. 48, ¶ 403, 420 (1986).

We conclude that the lag quarter is in fact a valid eligibility requirement. Ms. Pennington, who applied for benefits in the sixth quarter and who needed to include her earnings from the fifth or "lag" quarter to qualify, was simply ineligible for benefits at the time of her application. There is no dispute that Ms. Pennington and claimants similarly situated are promptly found to be ineligible when they apply for benefits during the "lag quarter." They are advised that they may reapply in the next quarter and at that time, if they are still out of work, their benefits are promptly found to be due and are promptly paid. Viewed in this light, computing the earnings necessary for eligibility based on the "first four of the last five

[8] Illinois has also established a number of bases for disqualification of an otherwise eligible claimant, including, among other things, voluntarily leaving employment, discharge for misconduct, refusal of work, unemployment due to a labor dispute, receipt of other unemployment benefits and receipt of workers compensation benefits. *See* Ill. Rev. Stat. ch. 48, ¶¶ 431-36 (1986).

quarters" is an eligibility requirement which Illinois may properly utilize in its discretion.

The lag quarter, as an eligibility requirement, does not result in a delay in the payment of benefits to which a claimant is in fact entitled. When a claimant applies in the sixth quarter, he or she is not entitled to the retroactive payment of any past benefits based on the first, invalid application; he or she is entitled only to benefits from the time of the second, valid claim. In the event the claimant finds work between filing the first application during the "lag quarter" and the beginning of the following quarter, he or she will be unable to claim any benefits at all. There is no delay in either the determination of benefits or payment of benefits when due.

Under this analysis, *Jenkins v. Bowling*, 691 F.2d 1225 (7th Cir. 1982), and *California Department of Human Resources Dev. v. Java*, 402 U.S. 121 (1971), are inapposite. In both cases, the state had made an initial determination that the claimant was eligible (in *Java* at a preliminary hearing[9] and in *Jenkins* at the time of application[10]), but the claimant was subsequently disqualified. Consequently, otherwise eligible claimants had to wait for the completion of other proceedings, causing an indefinite delay or interruption in their receipt of benefits, to see if their eligibility for those benefits was permanently lost. Here, in contrast, Ms. Pennington and similarly situated applicants are simply ineligible when they make their initial applications.

Ms. Pennington argues that this is a distinction without a difference. She points out that in both *Jenkins* and

[9] 402 U.S. at 127-28.

[10] 691 F.2d at 1229.

Java, the state legislatures could have written the challenged provisions of the statutes to provide that when an additional procedure is required to determine eligibility, the claimant is simply denied benefits until the claims are finally resolved. However, we are not persuaded by this analysis. In *Jenkins*, the statute clearly provided that the eligibility was "held in abeyance pending the result of any legal proceedings arising therefrom." 691 F.2d at 1227. *See* Ill. Rev. Stat. ch. 48, ¶ 432(B) (1986). There, of the total number of claimants affected by the provision at issue, thirty-nine percent were later found to be eligible and were paid benefits retroactive to the date of their initial applications. *Id.* at 1229. This was the basis of the Seventh Circuit's finding in *Jenkins* that the disputed provision constituted an unjustified delay. Here, by definition, no claimant is even eligible in the sixth quarter if he must include fifth quarter earnings in order to meet the earnings levels requirement. This distinction is a substantive difference.

We recognize that the Illinois base period (with its lag quarter) results in a delay in the payment of benefits for those claimants who (1) need earnings from the lag quarter to qualify, and (2) remain unemployed until the following quarter. That delay can be as short as a few days or as long as three months. So we must consider whether the delay is administratively justifiable. In *Jenkins*, Judge Posner wrote:

> Of course [a claimant] must meet the state's eligibility criteria but if the state delays indefinitely in deciding whether he has met them it defeats the objectives behind requiring prompt payment.
>
> . . . .
>
> If Illinois had good reason to postpone the payment of benefits to these people, then bearing in mind that the state has a legitimate interest in enforcing its

> valid eligibility criteria and minimizing its administrative expenses, we would not regard section 303(a)(1)—which only requires administrative methods "reasonably calculated" to ensure prompt payment—as a bar to postponement. But postponement must not be unreasonable.

Jenkins, 691 F.2d at 1229. Since the delay which concerns us results from the inclusion of the lag quarter in the base period, we must look to the length of, and the reasons for, the lag quarter.

As discussed earlier, Illinois is a wage reporting state. Under the administrative procedure described above (*see supra* at 4-5), Illinois needs about six weeks after the close of any quarter before it can verify an applicant's entitlement to benefits based in part on earnings in that quarter. Since Illinois has a legitimate interest in preventing ineligible individuals from receiving compensation, its use of the first six weeks of the quarter for verification is a legitimate administrative purpose. Consequently, the earliest time at which a claimant could expect payment would be after this administrative process has been completed, that is, during the last seven weeks of the quarter. The evidence presented at trial indicates that the class Ms. Pennington represents experiences an average delay of about four weeks after the state has completed its administrative process, or about ten weeks after the start of the quarter.[11]

We conclude that Illinois' inclusion of the lag quarter as an eligibility requirement does not violate the state's

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[11] A member of the plaintiff class could file for benefits in the beginning, middle or end of the sixth quarter. Thus, one class member could experience a delay of eighty-nine days while another a delay of only a few days.

duty to ensure that payment is made as soon as "administratively feasible." *Java*, 402 U.S. at 121. A "lag" period has been part of Illinois' statutory scheme since 1955.[12] In fact, for claims beginning in November 1981, the "lag" period was shortened from "not less than four months" to one calendar quarter.[13] While the allowance of an entire quarter for administrative purposes does not reflect precisely the amount of administrative time the state actually needs at present, we find that it does not constitute an "indefinite delay." *See Jenkins*, 691 F.2d at 1229. It is undeniable that changes in technology since the current provision was enacted twelve years ago mean that, if Illinois had state-of-the-art computer hardware and software, it could process earnings information more quickly, but this fact does not render unreasonable the legislature's selection of one calendar quarter for administrative processing. We do recognize, however, that under certain circumstances an antiquated processing system could function so poorly as to create an unreasonable delay where reasonable alternatives exist. *See, e.g., Burtton v. Johnson*, 538 F.2d 765, 770 (7th Cir. 1976) (staffing and funding problems not satisfactory explanations of failure to make benefits payments promptly) (citing *Cornelius v. Minter*, 395 F. Supp. 616, 621 (D. Mass. 1974)). But the inclusion of the "lag quarter" as administratively necessary does not constitute such a circumstance.

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[12] *See* Samuel Bernstein, "The Illinois Unemployment Insurance Act," Ill. Rev. Stat. ch. 48, at p. XXXI, n.44 (Smith-Hurd 1986).

[13] Previously, the base period for benefit years beginning prior to November 1, 1981 was "the four consecutive calendar quarters ending not less than four months nor more than six months prior to the month in which the benefit year began." Samuel Bernstein, "The Illinois Unemployment Insurance Act," Ill. Rev. Stat. ch. 48, at p. XXXI, n.44 (Smith-Hurd 1986).

Conclusion

For the reasons set forth above, we hold that definition of "base period" set forth in section 237 of the Illinois Unemployment Compensation Act, Ill. Rev. Stat. ch. 48, ¶ 347 (1986), is a valid eligibility requirement for unemployment benefits and does not violate the Supremacy Clause of the United States Constitution. Consequently, we enter judgment in favor of Defendant Sally Ward, Director of the Illinois Department of Employment Security, and against Plaintiff Luella Pennington, individually and as representative of a class of persons similarly situated, as to all claims.

ENTER:

/s/ Paul E. Plunkett
United States District Judge

DATED: October 21, 1992